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Supreme Court, U.S.
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Supreme Court of the United States

LEONARDO ZULUAGA-MARTINEZ,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner is a lawfully admitted alien who committed a criminal offense twenty-five days before achieving the required seven year residency period necessary to apply for relief from removal. Under the law at the time of Petitioner's offense, he was eligible to continue accruing time toward the seven year residency requirement until a final order of removal was entered against him. The Court of Appeals for the Second Circuit (and the administrative courts) held that the "stop-time rule" of the Illegal Immigration Reform & Immigrant Responsibility Act of 1996 ("IIRIRA"), 8 U.S.C. §1229 (d)(1)(B), which went into effect nearly two years after Petitioner's offense (and long after he had attained the required seven years) could be applied retroactively. The Second Circuit held that there was no impermissible retroactive effect from the application of the stop-time rule because it was theoretically possible for Petitioner to have been convicted and subject to a final order of removal (all within the twenty-five days prior to reaching the seven year residency requirement). The Second Circuit based its holding, in large part, on the fact that Petitioner did not demonstrate that he had actually and detrimentally relied on the prior state of the law.

This case presents the following questions:

1. Did the Second Circuit err in holding that application of the stop-time rule to Petitioner did not have an impermissible retroactive effect, where application of the "stop-time rule" meant certain deportation, and where Petitioner had previously

faced only possible deportation, with a right to apply for a waiver, and with a right to a hearing?

2. Is it error for the Second Circuit to require that a defendant demonstrate actual and detrimental reliance in order to show an impermissible retroactive effect, where this Court's precedents do not require such a result and the majority of other circuits have no such requirement?

PARTIES TO THE PROCEEDING

The parties to the proceeding below before the United States Court of Appeals for the Second Circuit include Petitioner Leonardo Zuluaga-Martinez, ("Mr. Zuluaga-Martinez") who was the petitioner-appellant, and Respondent Immigration and Naturalization Service, which was the appellee.

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PETITION FOR WRIT OF CERTIORARI

Mr. Zuluaga-Martinez respectfully requests this Court to issue a writ of *certiorari* to review the decision of the United States Court of Appeals for the Second Circuit entered in this case on April 23, 2008.

OPINION BELOW

The April 23, 2008, opinion of the United States Court of Appeals for the Second Circuit is published at 523 F.3d 365 and set forth in the appendix at (A-3).

STATEMENT OF JURISDICTION

Mr. Zuluaga-Martinez seeks review of the judgment issued by the United States Court of Appeals for the Second Circuit on April 23, 2008, denying his petition for review of the Board of Immigration Appeals ("BIA") decision. App. at (A-3). Petitioner filed a petition for rehearing *en banc* on June 9, 2008. The Second Circuit denied the petition on July 23, 2008. App. at (A-1). This petition for *certiorari* is timely filed within ninety days of the ruling on the petition for rehearing. Petitioner invokes this Court 's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

8 U.S.C. § 1229b Cancellation of Removal; adjustment of status

(a) Cancellation of removal for certain permanent residents

The Attorney General may cancel removal in the case of an alien who is inadmissible or deportable from the United States if the alien - (1) has been an alien lawfully admitted for permanent residence for not less than 5 years, (2) has resided in the United States continuously for 7 years after having been admitted in any status, and (3) has not been convicted of any aggravated felony.

(b) Cancellation of removal and adjustment of status for certain nonpermanent residents

(1) In general

The Attorney General may cancel removal of, and adjust to the status of an alien lawfully admitted for permanent residence, an alien who is inadmissible or deportable from the United States if the alien -

(A) has been physically present in the United States for a continuous period of not less than 10 years immediately preceding the date of such application;

(B) has been a person of good moral character during such period;

(C) has not been convicted of an offense under section 1182(a)(2), 1227(a)(2), or

1227(a)(3) of this title, subject to paragraph (5); and

(D) establishes that removal would result in exceptional and extremely unusual hardship to the alien's spouse, parent, or child, who is a citizen of the United States or an alien lawfully admitted for permanent residence....

8 U.S.C. § 1229b(d)(1)(B) Special Rules Relating to Continuous Residence or Physical Presence

(c) **Special rules relating to continuous residence or physical presence**

(1) Termination of continuous period

For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end (A) except in the case of an alien who applies for cancellation of removal under subsection (b)(2) of this section, when the alien is served a notice to appear under section 1229(a) of this title, or (B) when the alien has committed an offense referred to in section 1182(a)(2) of this title that renders the alien inadmissible to the United States under section 1182(a)(2) of this title or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.

STATEMENT OF THE CASE

This case raises two fundamental and critical questions regarding the Second Circuit's departure from this Court's retroactivity jurisprudence. At issue is the determination of whether 8 U.S.C. § 1229b(d)(1)(B) (the "stop-time rule") may be applied retroactively to Mr. Zuluaga-Martinez. He is a lawfully admitted alien who *committed* a criminal offense *before* the stop-time rule was enacted and twenty-five days prior to achieving the required residency period for eligibility for cancellation of removal. His *conviction* for the offense occurred *after* its enactment. Before enactment, he would have achieved seven years continuous presence, an essential element in seeking relief from removal. After enactment, if applied retroactively to Mr. Zuluaga-Martinez, his period of continuous residence would have terminated with commission of the crime, and he would be ineligible for any relief from cancellation of removal.

The first question is whether the Second Circuit erred in determining, through hypothetical reasoning, that because deportation was a *potential* consequence at the time of the commission of the crime, the later-enacted stop-time rule, which made deportation *certain*, attached no new legal consequences to Mr. Zuluaga-Martinez's actions, making its retroactive application permissible. Contrary to this Court's precedent, the Second Circuit erred in concluding that the *certainty of deportation* (the clear consequence of retroactive application of the stop-time rule to Mr. Zuluaga-Martinez) was no different than *eligibility to seek relief from deportation* (under INA § 212(c) as it

existed at the time of the offense) and thus did not change the legal consequences of Mr. Zuluaga-Martinez's criminal act. To justify this erroneous conclusion, the court hypothesized that Mr. Zuluaga-Martinez *might* have been convicted of the offense and ordered deported—all within the twenty-five days between his commission of the crime and the date that he would have achieved the required seven years of continuous residency (absent the stop-time rule). Such speedy dispatch has never been realistic. The law as it then existed permitted accrual of time toward residence after commission of a crime and before conviction. The court's hypothetical effectively eliminates both the longstanding presumption against retroactive application of new laws and the effect of the new law in changing the rule as to accrual of continuous residence.

This case presents a second, and equally important, question upon which there is significant disagreement among the lower courts: whether the Second Circuit erred in requiring subjective reliance on the previous law as a necessary element to show an impermissible retroactive effect. The Second Circuit's rule has been expressly rejected by other circuits, largely because it turns the long-standing presumption against retroactivity on its head and is inconsistent with this Court's retroactivity cases. As set forth below, there are conflicting decisions among the circuit courts of appeal that have developed standards for the application of a retroactivity analysis to individual cases. They have left an uncertain landscape as to the law and how it will be applied, leading to inconsistent results and expectations throughout the country. Certain of the circuit courts, including the Second Circuit, have

departed from clear Supreme Court precedent, holding that there is a presumption against retroactive application of a statute, by placing the burden of proving reliance on a petitioner and further by requiring the petitioner to show actual, subjective reliance to sustain a retroactivity claim.

This Court should grant *certiorari* to correct this plain error below, as analyzed in the concurring opinion of Judge Straub. App. at (A-31). In so doing, the Court will resolve a circuit split, clarify the appropriate standard for retroactivity analysis, and provide much-needed certainty to lower courts throughout the country.

I. Background Facts and Procedural History

This case arises under IIRIRA, which became effective on April 1, 1997, and involves a lawful permanent resident ("LPR"), Mr. Zuluaga-Martinez. Mr. Zuluaga-Martinez, a native of Colombia, entered the United States in April 1985. He applied for temporary resident status on May 4, 1988, and became an LPR on December 1, 1990. In May 1998 he pled guilty to charges stemming from an April 9, 1995, arrest in Massachusetts for drug possession and assault and battery. He received a sentence of 18 months in prison. Shortly after his conviction, in June 1998, the then Immigration and Naturalization Service ("INS") served Mr. Zuluaga-Martinez with a Notice to Appear, charging him as a removable alien because he had been convicted of a violation of a law relating to a controlled substance. *See* INA § 237(a)(2)(B)(i). In March 1999, Mr. Zuluaga-Martinez was convicted again in Massachusetts on charges stemming from a November 21, 1997, arrest for possession of heroin. The INS then added the

second conviction and the assault and battery charges to the list of offenses to support its allegation that Mr. Zuluaga-Martinez was removable. *See* INA §§ 237(a)(2)(A)(iii) and 237(a)(2)(B)(i).

In May 1999, Mr. Zuluaga-Martinez appeared before an Immigration Judge ("IJ"). The IJ concluded that, due to his convictions, Mr. Zuluaga-Martinez was removable from the United States. The IJ further held that the assault and battery offenses were aggravated felonies that made Mr. Zuluaga-Martinez statutorily ineligible to seek cancellation of removal under INA § 240A(a). The IJ then ordered Mr. Zuluaga-Martinez removed to Colombia.

Mr. Zuluaga-Martinez appealed that decision to the Board of Immigration Appeals ("BIA"). He also filed a motion in Massachusetts state court to vacate his assault and battery convictions on the grounds that the trial court had failed to warn him about the immigration consequences of his guilty plea; the motion was granted. In September 2001, the BIA reversed its initial dismissal of Mr. Zuluaga-Martinez's appeal and granted his motion to reopen his case and remand it to the IJ so that he could pursue cancellation of removal, as he was no longer an aggravated felon and thus would not be ineligible for that remedy.

On remand, in May 2002, the IJ, in a wholly new analysis, determined that Mr. Zuluaga-Martinez was still not eligible for cancellation of removal because he could not establish seven years of continuous residency. The IJ calculated that Mr. Zuluaga-Martinez's residency period began with his application for temporary resident status on May 4,

1988, and ended on April 9, 1995, the date that he committed his first drug offense. The date of this offense was just twenty-five days before Mr. Zuluaga-Martinez met the seven year threshold of continuous residence. Meeting this threshold—without first being ordered removed—allowed Mr. Zuluaga-Martinez to apply for cancellation of removal. *See* 8 U.S.C. § 1229b(a)(2). Nearly two years later, on April 1, 1997, the stop-time rule became effective.

Under the stop-time rule, an alien's accrual of continuous residence stops when he commits certain criminal offenses. *See* 8 U.S.C. § 1229b(d)(1)(B). The IJ applied the stop-time rule retroactively to Mr. Zuluaga-Martinez and determined that he was ineligible for cancellation of removal because he had failed to meet the seven-year continuous residency requirement by twenty-five days.

Mr. Zuluaga-Martinez then moved for reconsideration on the ground that the application of the stop-time rule was impermissibly retroactive. The IJ denied the motion, citing *In re Perez,* 22 I. & N. Dec. 689 (B.I.A. 1999) (*en banc*), in which the BIA applied the stop-time rule to offenses that were committed before IIRIRA took effect. Mr. Zuluaga-Martinez again appealed to the BIA, which denied his appeal, also relying on *Perez.* He thereafter filed a petition for review with the Second Circuit.

II. The Decision of the Court of Appeals for the Second Circuit

The Second Circuit majority affirmed the BIA's ruling, concluding that, under *Landgraf v. USI Film Prods.,* 511 U.S. 244 (1994), it was proper to apply the stop-time rule of IIRIRA retroactively to

Mr. Zuluaga-Martinez. *Martinez v. I.N.S.*, 523 F.3d 365, 379 (2d Cir. 2008).

In the majority opinion, the Second Circuit began its retroactivity analysis by observing that Congress did not expressly command that the stop-time rule be applied retroactively. *Martinez*, 523 F.3d at 370 ("The absence of such an express statement with respect to [the stop-time rule] indicates 'that Congress did not definitively decide the issue of [the provision]'s retroactive application to pre-enactment [conduct].'") (internal citations omitted).[1]

The majority then moved to the second step of its *Landgraf* analysis, under which a statute is impermissibly retroactive if it "takes away or impairs vested rights acquired under existing laws,

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[1] The Government had argued that Congress intended the stop-time rule to apply retroactively based on IIRIRA's transitional rules. *Id.* at 371. The majority correctly rejected this argument and noted that, because the immigration proceedings against Mr. Zuluaga-Martinez "were *not pending* when IIRIRA was enacted or went into effect, the transitional rules do not apply." *Id.* The Government further argued that it would be "incongruous" to hold that the stop-time rule did not apply retroactively to Mr. Zuluaga-Martinez when the Second Circuit had previously applied it retroactively to other petitioners who were subject to the transitional rules and asked the Second Circuit to proceed "as *if it were* a transitional-rule case," citing *Garcia-Ramirez v. Gonzales*, 423 F.3d 935 (9th Cir. 2005); *Heaven v. Gonzales*, 473 F.3d 167 (5th Cir. 2006) (emphasis in original). *Id.* The court rejected this argument also, noting that it could not "artificially stretch the transitional rules to cover this case" and noted that "when Congress wanted the [stop-time] provision to apply retroactively to a limited category of cases - deportation cases pending when IIRIRA took effect - it said so clearly." *Id.* (*quoting Henry v. Ashcroft*, 175 F.Supp.2d 688, 694 (S.D.N.Y. 2001)).

or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *Id.* at 373 (quoting *Landgraf*, 511 U.S. at 265). Any of these effects is "a *sufficient*, rather than a *necessary*, condition for invoking the presumption against retroactivity." *Id.* (quoting *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 947 (emphasis in original)). The majority further noted that, in applying this framework, it was required to exercise a "commonsense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment" and that its analysis was "informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations." *Id.* (*quoting INS v. St. Cyr*, 533 U.S. 289, 321 (2001)).

Instead of examining the facts in Mr. Zuluaga-Martinez's case, however, the majority considered a purely hypothetical set of facts and incorrectly concluded that IIRIRA's stop-time rule did not change the legal consequences of Mr. Zuluaga-Martinez's actions. The Court then held that retroactive application of the stop-time rule was therefore permissible. The majority based its conclusion on the *possibility* that Mr. Zuluaga-Martinez *could* have been expeditiously prosecuted, convicted, given notice of intent to remove, and become subject to an order of deportation–all within twenty-five days after his arrest, that is before he met the seven year residency threshold. *Id.* at 373-74. In the majority's words, "[i]t was only the time required to bring an offender to justice that pushed the disposition of his case beyond the seven-year threshold." *Id.* at 374. But, under the law as it then

existed, inaction by the government or delay in obtaining an order of deportation did not interrupt accrual of continuous residence, and only the *entry of an order of removal*—not the date of *commission* of the offense—would have stopped the accrual. This was a crucial distinction because, as the majority itself noted, a substantial percentage of applicants who requested discretionary relief from removal were successful. *Id.* at 368 (citing *St. Cyr*, 533 U.S. at 296 and noting that between 1989 and 1995, over 10,000 applicants received discretionary relief from removal). Thus, Mr. Zuluaga-Martinez's legal consequences were, in fact, altered by retroactive application of the stop-time rule.

Relying on Second Circuit precedent, the majority opinion also rested on its conclusion that Mr. Zuluaga-Martinez could not establish that he had relied on the state of the law prior to the stop-time rule. It said that such reliance plays "a central role in the court's analysis" in the immigration context and recalled that, in the wake of this Court's analysis in *St. Cyr*, 533 U.S. 289, the Second Circuit had required a *showing* of detrimental reliance in order to demonstrate an impermissible retroactive effect of IIRIRA. *Id.* at 375 (*citing Wilson v. Gonzales*, 471 F.3d 111, 122 (2d Cir. 2006); *Rankine v. Reno*, 319 F.3d 93, 100 (2d Cir. 2003)). The majority opinion then concluded that Mr. Zuluaga-Martinez could not "show a protectable reliance interest" absent which there was no impermissible effect associated with the retroactive application of the stop-time rule. *Id.* at 376. While the majority opinion took pains to assert that it was not basing its conclusion solely on the Second Circuit's reliance

requirement, as Judge Straub argued that clearly was not the case.

Judge Straub's Concurrence

Judge Straub, in a comprehensive concurrence, correctly observed that "under the prior law. . . the timing of the commission of the offense posed no bar whatsoever to Zuluaga's ability to apply for a waiver of deportation." *Martinez,* 523 F. 3d at 377 (Straub, J., concurring). The loss of the ability to apply for a waiver of deportation, and the entitlement to a hearing to present a case for such a waiver are, according to Judge Straub, significant changes to the legal consequences of Mr. Zuluaga-Martinez's actions and were caused solely by retroactive application of IIRIRA's stop-time rule. *Id.* at 378-69 ("Although IIRIRA did not change the impact of Zuluaga's offense on the initial determination of deportability, it changed the consequence of the timing of his criminal act by eliminating the possibility of relief from removal that was previously available to him."). According to Judge Straub, the majority's retroactive application of the stop-time rule to Mr. Zuluaga-Martinez, "attache[d] unforeseen, and severe, legal consequences to past conduct that cannot be undone." *Id.* at 379 (Straub, J., concurring).

That severe legal consequence, as previously noted by this Court, was the difference between *possible* and *certain* deportation. *See St. Cyr,* 533U.S. at 325 ("There is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation."). Because there is no clear indication in IIRIRA that Congress "affirmatively considered

the potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits," the presumption against retroactivity counsels against allowing the stop-time rule to apply to past conduct. *Martinez*, 523 F.3d at 379 (Straub, J., concurring) (quoting *Landgraf*, 511 U.S. at 272-73).

Judge Straub was also highly critical of the majority's "reliance" analysis and, indeed, of the Second Circuit's requirement of actual, detrimental reliance to show impermissible retroactive effect. Judge Straub noted that the Second Circuit is out of step with the majority of its sister circuits. *Id.* at 382-86 (*citing Atkinson v. Attorney General of U.S.*, 479 F.3d 222 (3d Cir. 2007) and *Olatunji v. Ashcroft*, 38 F.3d 383 (4th Cir. 2004) (both holding that a showing of reliance is not required to prevail on a claim of impermissible retroactivity); *Thaqi v. Jenifer*, 377 F.3d 500 (6th Cir. 2004), *Camins v. Gonzales*, 500 F.3d 872 (9th Cir. 2007), and *Hem v. Maurer*, 458 F.3d 1185 (10th Cir. 2006) (all holding that reliance is required, but only objective, reasonable reliance); *but see Dias v. I.N.S.*, 311 F.3d 456 (1st Cir. 2002), *Carranza-De Salinas v. Gonzales*, 477 F.3d 200 (5th Cir. 2007), and *Brooks v. Ashcroft*, 283 F.3d 1268 (11th Cir. 2002) (all three, like the Second Circuit, requiring individualized, subjective detrimental reliance)).

Judge Straub concurred, instead of dissented, because he felt bound by the Second Circuit's "reliance" precedent (despite his vigorous disagreement) and because Mr. Zuluaga-Martinez could not make the requisite showing of actual subjective reliance. *Id.* at 386. Judge Straub specifically noted that the Second Circuit should

rethink its position. *Id.* ("whether—and to what extent—a showing of reliance on the prior law is required to demonstrate impermissible retroactive effect of a new law is the subject of much debate and, perhaps, should be re-visited or reviewed.") (internal citations and quotations marks omitted).

Mr. Zuluaga-Martinez filed a petition for rehearing *en banc,* arguing that the Second Circuit's requirement of actual, detrimental reliance does not follow Supreme Court retroactivity precedent and the persuasive authority of the majority of the other circuit courts of appeal. On July 23, 2008, the Second Circuit denied Mr. Zuluaga-Martinez's petition for rehearing *en banc.* This petition followed.

REASONS FOR GRANTING THE WRIT

The Court should grant certiorari in order to resolve inconsistencies among the circuits, lower courts, and administrative courts, and to clarify how this Court's retroactivity rules should be applied. This case raises two questions of broad and general importance for retroactivity analysis—both of which were answered incorrectly by the Second Circuit and the immigration courts. Both errors impermissibly tilted the longstanding presumption *against* retroactive application of new laws toward a presumption *in favor* of retroactive application of new laws.

First, the Second Circuit erred in determining that application of the stop-time rule did not have an impermissible retroactive effect on Mr. Zuluaga-Martinez. The court based its conclusion on the purely theoretical possibility that application of the stop-time rule *might not have* had an effect on Mr.

Zuluaga-Martinez. The reality, of course, is that Mr. Zuluaga-Martinez went from *possible* deportation, with a right to seek a waiver of removal and to be heard, to *certain* deportation and a loss of those rights. As this Court found in *St. Cyr*, that is a clear change in legal consequences.

Second, the Second Circuit's requirement that a petitioner must demonstrate actual, detrimental reliance on the previous state of the law in order to show an impermissible retroactive effect is inconsistent with Supreme Court precedent and the majority of the other circuits.

I. The Difference Between "Certain Deportation" and "Possible Deportation" Shows that Application of the Stop-Time Rule to Mr. Zuluaga-Martinez Would Have an Impermissible Retroactive Effect

This Court has long recognized a strong presumption against the retroactive application of new legislation. *See, e.g., Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 841 (1990) (Scalia, J., concurring) (describing the long history of the presumption against the retroactive application of new laws). This deeply-rooted principle reflects "elementary considerations of fairness" by ensuring that the rule of law gives people at least a basic level of certainty about the legal consequences of their actions. *Landgraf*, 511 U.S. at 265. The Second Circuit's application of the stop-time rule to Mr. Zuluaga-Martinez fails to respect this important presumption, and, in fact, turns it on its head.

a. The *Landgraf* Test

In *Landgraf*, the Court set forth a two-step test for determining whether a federal statute can be applied retroactively. *Id.* at 280. The first step is to determine whether Congress expressly required the statute to be applied retroactively. *Id.* If the statute so dictates, then the judicial inquiry is over, and the statute must be construed to implicate past events. *Id.* And, while there has been some disagreement among the Justices on precisely what "expressly" means, that issue is not implicated in this case.

If the statute does not expressly require retroactive application, a court must engage in the second part of the *Landgraf* analysis: whether the law would have an "impermissible retroactive effect." A statute has an impermissible retroactive effect if it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *Id.* at 265. If a statute has an impermissible retroactive effect, then the presumption against retroactivity would be triggered and the statute cannot be applied retroactively. *Id.*

b. The Second Circuit's Misapplication of *Landgraf*

The Second Circuit erred in its application of the second prong of Landgraf. While noting that a statute has an impermissible retroactive effect if it "attaches new legal consequences to events completed before its enactment," *id.* at 373 (*citing St. Cyr*, 533 U.S. at 321), the court clearly erred in

determining that the application of the stop-time rule to Mr. Zuluaga-Martinez did not attach "new legal consequences" to his actions.

Before IIRIRA, when Mr. Zuluaga-Martinez committed his offense, the law posed no bar whatsoever to his right to apply for a waiver of deportation. Indeed, Mr. Zuluaga-Martinez had the right to seek a waiver so long as the conviction and final order of removal were entered *after* he acquired seven years of residency. *Id.* at 377 (Straub, J., concurring). It is undisputed that Mr. Zuluaga-Martinez was *not* convicted and was *not* subject to an order of removal until well after he had achieved seven years of residency. *Id.* at 366-67.

Under IIRIRA's stop-time rule, however, termination of accrual occurs much earlier, at the time of the *commission* of the alleged offense. Applying the stop-time rule to Mr. Zuluaga-Martinez ended the permissible accrual of time toward the seven year residency threshold, which the previous law had sanctioned. No more critical change of consequences could be imagined.

As this Court made clear in *St. Cyr*, "[t]here is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation." 533 U.S. at 321. This is precisely the difference that arose as a result of the application of the stop-time rule to Mr. Zuluaga-Martinez. He was no longer able to become eligible to apply for a waiver of deportation. His application could well have been successful: as the Second Circuit pointed out, "[a]lthough the decision to grant §212(c) relief was ultimately a discretionary one, a 'substantial percentage' of applications were granted." *Martinez*, 523 F.3d at 368 (citing *St. Cyr*,

533 U.S at 296). Indeed, the fact that waiver under §212(c) was discretionary is irrelevant. *See St. Cyr,* 533 U.S. at 291 ("That §212(c) relief is discretionary does not affect the propriety of this Court's conclusion").[2] Under the applicable statute in place at the time of Mr. Zuluaga-Martinez's offense, he was eligible to continue accruing time toward the seven year residency requirement and apply for § 212(c) relief. *St. Cyr v. INS*, 229 F.3d 406, 418 (2d Cir. 2000) ("[I]t is the conviction, not the underlying criminal act, that triggers the disqualification from § 212(c) relief.") (internal citations omitted), *aff'd,* 533 U.S. 289 (2001).

c. The Second Circuit's Hypothetical, Counterfactual Analysis

The Second Circuit justified its conclusion by engaging in counterfactual analysis rather than examining the facts of Mr. Zuluaga-Martinez's case. The Second Circuit posited that Mr. Zuluaga-Martinez *could* have been prosecuted, convicted, and ordered removed within twenty-five days of the commission of his offense—all before he acquired his seven years of residency. *See Martinez*, 523 F.3d at

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2 District court cases applying *St. Cyr* in situations just like this one have consistently looked at the facts of the case, rather than hypothetical possibilities, in determining whether IIRIRA's stop-time rule can constitutionally be applied retroactively to criminal conduct before the Act's passage. *See, e.g., Generi v. Ashcroft*, No. 4:03-cv-15, 2004 WL 771138 (W.D. Mich. April 13, 2004) (unpublished) (retroactive application of the clock-stopping provision impermissibly retroactive based an analysis of events that actually transpired); *Henry v. Ashcroft*, 175 F. Supp. 2d 688 (S.D.N.Y. 2001) (same).

374. The Second Circuit then concluded that, because this hypothetical was theoretically possible, there was no new legal consequence to his conduct when the stop-time rule became law under IIRIRA. *Id.* In other words, according to the majority opinion, it was theoretically possible that even under pre-IIRIRA law, Mr. Zuluaga-Martinez *could* have been ordered removed prior to acquiring his seven years of residency.

As Judge Straub noted in his concurrence, "resort to hypothetical scenarios is unnecessary here, because the events that actually transpired in Zuluaga's case demonstrate clearly that retroactive application of the stop-time rule attached 'new legal consequences' to Zuluaga's past conduct." *Martinez*, 523 F.3d at 378 (Straub, J., concurring) (citing *St. Cyr*, 533 U.S. at 321).

Use of hypothetical scenarios to determine whether there has been a change in legal consequences was not only unnecessary, but turned the retroactivity analysis on its head. We note that this Court has certainly never used speculative hypotheticals to determine whether a statute has created an impermissible retroactive effect. Had it done so, the results of many of this Court's landmark retroactivity cases might well have been different.

In *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 950 (1997), for example, the Court held that a 1986 amendment to the False Claims Act that allowed private *qui tam* suits under certain new circumstances, could not be applied to pre-1986 conduct. The Court explained that "the 1986 amendment would revive that action, subjecting Hughes to previously foreclosed *qui tam* litigation, much like extending a statute of

limitations after the pre-existing period of limitations has expired impermissibly revives a moribund cause of action." (citing *Chenault v. U.S. Postal Service*, 37 F.3d 535, 537, 539 (9th Cir. 1994)). Had the Court examined hypothetical factual scenarios, it would have been easy to note that it was theoretically *possible* that no plaintiff would have ever brought such a *qui tam* claim and that, therefore, the application of the 1986 amendment would have had no new legal consequence. But that would have been fanciful. Instead, the Court based its analysis on the facts presented by the case and on the clear new legal consequence that Hughes—and others who were similarly situated—faced.[3]

Indeed, the majority below did not cite a single case or other authority, from this Court or any other, to support its unorthodox approach to retroactivity analysis.[4] The majority appears to have engaged in its hypothetical approach to avoid highlighting its long-standing and incorrect Second Circuit precedent that requires petitioners to

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3 Similarly, in *Chenault* itself, the Ninth Circuit considered the potential retroactivity of a statute that extended the filing period in employment discrimination cases against the government from thirty to ninety days. *Chenault*, 37 F.3d at 538-39. The Ninth Circuit ruled that "a newly enacted statute that lengthens the applicable statute of limitations may not be applied retroactively," despite the obvious existence of the hypothetical possibility that all such suits *could* have been filed within thirty days. *Id.* at 539.

4 Petitioner could, in fact, find no examples where this Court relied on hypothetical scenarios to determine whether a new statute imposed new legal consequences on past conduct. *See, e.g., St. Cyr*, 533 U.S. 289; *Landgraf*, 511 U.S. 244; *Martin v. Hadix*, 527 U.S. 343 (1999).

demonstrate actual detrimental reliance in order to show that a new statute has an impermissible retroactive effect. And Judge Straub's concurring opinion would clearly have been a dissent, except that he was constrained by the prior Second Circuit cases that require actual reliance. Judge Straub made clear, however, that it was his view that the Second Circuit is simply wrong, in that it is inconsistent with Supreme Court precedent, in requiring actual reliance. *See Martinez,* 523 F.3d at 382 (Straub, J., concurring).

II. The Second Circuit Rule that Requires a Showing of Actual Reliance in Order to Demonstrate an Impermissible Retroactive Effect is Inconsistent with this Court's Retroactivity Jurisprudence and Should Be Reversed

a. Reliance is Not a Necessary Element of Retroactivity Analysis

This Court has *never* required a finding of detrimental reliance in order to find an impermissible retroactive effect. *See, e.g., Landgraf,* 511 U.S. at 280; *Hughes Aircraft*, 520 U.S. 939; *Hadix*, 527 U.S. 343. In *Landgraf,* the Court considered whether a statute authorizing the recovery of compensatory damages for discrimination could be applied to discriminatory conduct that occurred prior to the enactment of the law. 511 U.S. at 282. The Court acknowledged that the law only affected conduct that was already prohibited and subject to monetary liability, stating that "concerns of unfair surprise and upsetting expectations are *attenuated* in the case of

intentional employment discrimination, which has been unlawful for more than a generation." *Id.* at 282-83 (emphasis added).[5] Nonetheless, the Court held that the statute would have an impermissible retroactive effect if applied to past conduct because it would attach "an important new legal burden to that conduct." *Id.* at 283.

Likewise, in *Hughes Aircraft*, the Court did not discuss actual or hypothetical reliance by the affected defendants, nor did the circumstances warrant such an analysis. *See Olatunji v. Ashcroft*, 387 F.3d 383 (4th Cir. 2004) ("And so it held without even a single word of discussion as to whether Hughes Aircraft – or, for that matter, similarly situated government contractors – had relied on the eliminated defense to its detriment.").

Similarly, in *Hadix*, this Court held that the judgment regarding retroactive effect "should be *informed* and *guided* by 'familiar considerations of fair notice, reasonable reliance, and settled expectations.'" 527 U.S. at 358 (emphasis added). It is difficult to square these cases with the Second Circuit's cases which actually *require* reliance in order to find an impermissible retroactive effect.[6]

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5 The Court has addressed reliance as it applies to the liability of employers for the past discriminatory conduct of its employees in some circumstances. *Landgraf*, 511 U.S. at 283 n.35. The Court made it clear, however, that the surprise element is *not* the determinative factor in its analysis. *Id.* (holding that there is a degree of unfairness whenever the law imposes additional burdens on conduct that occurred in the past).

6 Not only has this Court not required a showing of detrimental reliance for retroactivity, it has expressly held that mere reliance on prior law is not necessarily even a *sufficient* element to finding a statute retroactive. *Landgraf*, 511 U.S. at

Indeed, the correct inquiry should always be "whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 321 (quoting *Landgraf*, 511 U.S. at 270).

Without question, attaching new legal consequences to prior conduct may, under certain obvious circumstances, lead to detrimental reliance on the part of those individuals affected by the new law. In those instances, an analysis of reliance can be illustrative of the impermissible retroactive effect. For example, in *St. Cyr*, the Court considered whether a statute that drastically altered the legal consequences of a guilty plea to a particular criminal charge had an impermissible retroactive effect. 533 U.S. 289, 321 (2001). Because the conduct at issue—a criminal plea bargain—presumably involved an informed decision on the part of the defendant weighing the costs and benefits of forgoing a trial in exchange for a lighter sentence, the Court emphasized the detrimental reliance by the respondent and other similarly-situated individuals. *Id.* at 322.

Unfortunately, many lower courts have erroneously interpreted *St. Cyr* to hold that reliance is *required* in order to find an impermissible retroactive effect.[7] But the Court's emphasis on

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270 n.24 ("If every time a man relied on existing law in arranging his affairs, he were made secure against any change in legal rules, the whole body of our law would be ossified forever.") (quoting L. Fuller, *The Morality of Law*, 51-62 (1964)).

7 *See, e.g., Thaqi v. Jenifer*, 377 F.3d 500, 504 n.2 (6th Circ. 2004) (holding that *St. Cyr* requires that petitioner be among a class of people who likely relied on the prior law to demonstrate an impermissible retroactive effect).

reliance in *St. Cyr* was a response to the unique circumstances in that case, which showed that the petitioner had actually and detrimentally relied on the old law. But *St. Cyr* did *not* dictate that reliance had become a *necessary* element for impermissible retroactivity. *Atkinson v. Attorney General of U.S.*, 479 F.3d 222, 227 (3d Cir. 2007) ("Such a reading of *St. Cyr* [to require reliance], however, runs contrary to our understanding of prior Supreme Court law.").

A bright-line rule requiring actual or objective reliance conflicts with this Court's repeated emphasis on the necessary fluidity of retroactivity analysis. *See, e.g., Landgraf*, 511 U.S. at 268 ("[D]eciding when a statute operates 'retroactively' is not always a simple or mechanical task."); *Hughes Aircraft*, 520 U.S. at 947 ("[W]e recognized that the Court has used various formulations to describe the 'functional conception of legislative 'retroactivity[.]'"); *Hadix*, 527 U.S. at 358 (stating that the inquiry into whether a statute operates retroactively requires a commonsense, functional judgment). The Court has expressly stated that Justice Story's definition of retroactive legislation "does not purport to define the outer limit of impermissible retroactivity." *Hughes Aircraft*, 520 U.S. at 947. Indeed, in *St. Cyr*, the Court reiterated the idea that Justice Story's language is not the exclusive definition of impermissible retroactivity. 533 U.S. at 321 n.46.

Requiring reliance as a necessary element of retroactivity analysis erodes the time-honored judicial presumption against retroactivity. *See Hem v. Maurer*, 458 F.3d 1185, 1192 (10th Cir. 2006) ("[A] requirement that a petitioner demonstrate that he *actually* relied on [a prior law] turns the historic presumption against retroactive application of

statutes on its head."); *Olatunji*, 387 F.3d at 389 ("A careful review of both the basis for the judicially-imposed presumption against retroactivity and Supreme Court's retroactivity jurisprudence shows that the fact that [the statute] has attached new legal consequences [to prior conduct] . . . is, alone, sufficient . . . and that no form of reliance is necessary.").

b. The Second Circuit's Retroactivity Analysis Runs Counter to Supreme Court Precedent

The Second Circuit's reliance requirement improperly requires defendants to demonstrate that they altered their conduct in reliance on the prior law in order to show an impermissible retroactive effect. *See, e.g., Singh v. Mukasey*, 520 F.3d 119, 124-25 (2d Cir. 2008) (stating that "*Wilson* requires" a "showing of detrimental reliance"); *Wilson*, 471 F.3d at 113 (2d Cir. 2006) (holding that an individualized showing of reliance was required to establish impermissible retroactive effect); *Thom v. Ashcroft*, 369 F.3d 158 (2d Cir. 2004) (finding no detrimental reliance and thus no impermissible retroactive effect). The Second Circuit has based this misguided approach on what it referred to as the "strong signals" sent by *St. Cyr*, which it contends elevated reliance into a required element of retroactivity analysis. *See Rankine*, 319 F.3d at 99.

In light of these cases, it is not surprising that the majority below based its decision, in large part,

on the lack of detrimental reliance shown by Mr. Zuluaga-Martinez.[8]

The effect of the stop-time rule was to eliminate entirely Mr. Zuluaga-Martinez's ability to apply for a waiver of deportation based on a crime he committed prior to enactment of the new law. Yet the majority concludes this does not constitute a change in legal consequences. *Martinez,* 523 F.3d at 375. This holding can only be explained by recognizing that the Second Circuit has conflated "consequences" with Mr. Zuluaga-Martinez's reasonable expectations or reliance *before* he committed the crime. The majority's conclusion lends some insight into their reasoning: "[S]ettled expectations were not disrupted because, assuming that Mr. Zuluaga-Martinez expected anything with respect to deportation when he committed the offense, his expectation could not have been anything other than that he was subject to deportation without the opportunity for discretionary relief." *Id.* at 376-77.[9] In other words,

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8 The majority's failure to acknowledge explicitly that reliance was a determinative factor was perhaps in response to Judge Straub's concurring opinion, which stressed that a requirement of reliance runs contrary to Supreme Court precedent. *Martinez,* 523 F.3d at 382 (Straub, J., concurring) ("As various courts have noted, the requirement [of reliance] has not been imposed by, and in fact appears to run afoul of, Supreme Court retroactivity law."). An analysis of the substance as opposed to the form of the majority's reasoning in *Martinez* leads to the conclusion that a consideration of subjective reliance infected the majority's decision below.

9 While Mr. Zuluaga-Martinez could have known about the residency requirement and assumed he would still qualify for a waiver despite committing the crime because he was only twenty-five days away from the seven year threshold, the majority apparently discounted this potential reliance as

the Second Circuit considers "consequences" to be only those outcomes that Mr. Zuluaga-Martinez actually anticipated prior to the enactment of IIRIRA—namely, actual reliance.[10] *Id.* at 378 (Straub, J., concurring). The Second Circuit's approach does great harm to the presumption against retroactivity and fails to follow this Court's precedent.

c. There is a Direct Conflict of Authority Among and Within the Circuit Courts of Appeal as to Whether Reliance is a Necessary Element of Retroactivity Analysis

There is a clear split among and within the circuits as to whether reliance must be established to demonstrate that a law has a retroactive effect. *See, e.g., Hem*, 458 F.3d at 1191 ("[L]ower courts have split over. . . whether reliance must be

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unrealistic – although it was the most likely scenario given the facts of the case and the state of the law at the time of both his crime and conviction.

10 In declaring that Mr. Zuluaga-Martinez could only have expected deportation as a consequence at the time he committed the crime, the Second Circuit discounts any possibility that he was aware that he was reaching his seven-year mark and, in all likelihood, would not be ordered removed before he reached that mark, thus retaining his right to apply for a waiver of deportation. Taking the Second Circuit's reasoning to its logical extreme, the Court would presumably conclude that had Mr. Zuluaga-Martinez committed his crime on the day before he reached seven years of residency, making it impossible for him to be ordered removed before achieving that mark, there would still be no possibility of actual subjective reliance on the previous law. This is clearly an absurd result.

established objectively, subjectively, or even at all[.]").

Other circuits have not adopted the Second Circuit's view on subjective reliance and have limited their inquiry, where they believe reliance relevant, to objective, reasonable reliance for individuals impacted by the new law. *See Ponnapula v. Ashcroft*, 373 F.3d 480, 493 (3d Cir. 2004) ("The likelihood that the party before the court did or did not in fact rely on the prior state of the law is not germane to the question of retroactivity. Rather, courts are to concentrate on the group to whose conduct the statute is addressed. . .with a view to determining whether reliance was reasonable."); *Hem v. Maurer*, 458 F.3d 1185, 1191 (10th Cir. 2006) ("[W]e conclude that only objectively reasonable reliance on prior law is necessary to sustain a retroactivity challenge."); *Thaqi v. Jenifer*, 377 F.3d 500, 504 n.2 (6th Cir. 2004) (holding that petitioner need not demonstrate actual reliance, but he must be among a class who made a decision in reliance on prior law); *Camins v. Gonzales*, 500 F.3d [illegible], 884 (9th Cir. 2007) ("[W]e require that reliance on the prior law 'would have been objectively reasonable under the party's circumstances.'").[11]

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[11] In conflict with the "objective reliance test" are decisions of the Second Circuit, along with the First, Fifth, Seventh, and Eleventh Circuits, which have held that actual, subjective reliance is necessary to find a statute impermissibly retroactive. *See Dias v. I.N.S.*, 311 F.3d 456, 458 (1st Cir. 2002) (holding that defendant was foreclosed from arguing statute had impermissible retroactive effect because he did not rely on the prior law); *Carranza-De Salinas v. Gonzales*, 477 F.3d 200, 205 (5th Cir. 2007) ("Because the reliance demonstrated must be actual, the determination of retroactive effect is made as to the individual applicant, not as to a group

Decisions in three circuits—the Third, Fourth and Eighth—reject the necessity of showing subjective or objective reliance in concluding that a statute is impermissibly retroactive. *Atkinson v. Attorney General of U.S.*, 479 F.3d 222, 229 (3d Cir. 2007) ("Impermissible retroactivity, as defined in *Landgraf*, does not require that those affected by the change in law have relied on the prior state of the law."); *Olatunji v. Ashcroft*, 387 F.3d 383, 389 (4th Cir. 2004) (holding that the attachment of new legal consequences is all that is needed to find a statute impermissibly retroactive); *Davey v. City of Omaha*, 107 F.3d 587 (8th Cir. 1997) (holding that law would have impermissible retroactive effect with no discussion of reliance).

Whether reliance is required and the question of the appropriate use of reliance in retroactivity analysis has created "a confusion [that] exists within the Supreme Court. . .[and] extends throughout the Courts of Appeals. . . . And, unsurprisingly, the same confusion exists among the parties to suit in the federal courts." *Olatunji*, 387 F.3d at 390. *See also, e.g., Thom v. Ashcroft*, 369 F.3d 158, 163 n.6 (2d Cir. 2004) (majority opinion author acknowledging that circuit has veered from Supreme Court precedent and that he might hold differently if "judging on a clean slate").

This sharp split among the circuits has prompted at least one judge to invite further review

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of similarly-situated applicants."); *U.S. v. De Horta Garcia*, 519 F.3d 658, 661 (7th Cir. 2008) ("[W]e have not read [*St. Cyr*] as altering the actual reliance requirement."); *Brooks v. Ashcroft*, 283 F.3d 1268, 1274 (11th Cir. 2002) (holding that Petitioner could not demonstrate retroactive effect because he did not rely upon the law like those that entered into plea agreements with the government).

of the retroactivity analysis. *Martinez,* 523 F.3d at 386 (Straub, J., concurring) ("[W]hether—and to what extent—a showing of reliance on the prior law is required to demonstrate impermissible retroactive effect of a new law is the subject of much debate and, perhaps, 'should be re-visited' or reviewed."). This case presents the Court with an opportunity to clarify the confusion arising from *St. Cyr* that has created widespread uncertainty throughout the federal court system, and has resulted in a patchwork of inconsistent and often unfair results for petitioners.

CONCLUSION

For the reasons set forth herein, Petitioner respectfully requests that this Court grant the writ of *certiorari* and review this case.

Respectfully Submitted,

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APPENDIX

APPENDIX A—ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DENYING PETITION FOR REHEARING ON BANC ISSUED ON JULY 23, 2008

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
THURGOOD MARSHALL U.S. COURT HOUSE
40 FOLEY SQUARE, NEW YORK, N.Y. 10007

Catherine O'Hagan Wolfe
CLERK OF COURT

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 23rd day of July two thousand and eight,

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LEONARDO ZULUAGA MARTINEZ,

Petitioner,

v.

ORDER
No. 03-41049-ag

IMMIGRATION AND NATURALIZATION SERVICE,

Respondent,

Leonardo Z. Martinez having filed a petition for panel rehearing, or, in the alternative, for rehearing *en banc*, and the panel that determined the appeal having considered the request for panel rehearing, and the active members of the Court having considered the request for rehearing *en banc*,

IT IS HEREBY ORDERED that the petition is denied.

UNITED STATES COURT OF APPEALS
FILED
JUL 23 2008
Catherine O'Hagan Wolfe, Clerk
SECOND CIRCUIT

For the Court:
Catherine O'Hagan Wolfe,
Clerk

By: s/Frank Perez
Frank Perez, Deputy Clerk

APPENDIX B—DECISION OF UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED ON APRIL 23, 2008

United States Court of Appeals, Second Circuit.
Leonardo Zuluaga MARTINEZ, Petitioner,
v.
IMMIGRATION AND NATURALIZATION SERVICE, Respondent.
Docket Nos. 03-41049-ag (L), 05-3319-ag (CON).

523 F.3d 365

Argued April 18, 2007.
Decided April 23, 2008.

Background: Alien petitioned for review of a decision of the Board of Immigration Appeals (BIA) denying cancellation of removal.

Holding: The Court of Appeals, John M. Walker, Jr., Circuit Judge, held that Illegal Immigration Reform and Immigration Responsibility Act (IIRIRA) stop-time rule would not have impermissible retroactive effect if applied to alien's drug offense.

Petition denied.

Straub, Circuit Judge, filed concurring opinion.

*366 Leonardo Zuluaga Martinez, pro se, Framingham, Mass., for Petitioner.

Lizas Murcia, Assistant United States Attorney (Terrance P. Flynn, United States Attorney for the Western District of New York, on the brief), Buffalo, N.Y., for Respondent.
Nancy Morawetz, Washington Square Legal Services, New York University School of Law, New York, N.Y., Amicus Curiae in Support of Petitioner.

Before: WALKER, STRAUB, and B.D. PARKER, Circuit Judges.

Judge STRAUB concurs in a separate opinion.

JOHN M. WALKER, JR., Circuit Judge:
Petitioner, a legal permanent resident alien, seeks review of a decision of the Board of Immigration Appeals affirming the immigration judge's denial of cancellation of removal for failure to satisfy the seven-year continuous residence requirement of INA § 240A(d), 8 U.S.C. § 1229b. Because petitioner's removal proceedings were initiated after the effective date of the Illegal Immigration Reform and Immigration Responsibility Act of 1996 ("IIRIRA"), the agency retroactively applied IIRIRA's permanent provisions, including the "criminal-offense stop-time rule," 8 U.S.C. § 1229b(d)(1)(B). The agency determined that pursuant to this rule, petitioner's commission of a criminal offense on April 9, 1995 terminated his period of continuous residence one month before he could achieve the requisite seven years. Petitioner asks us to review that determination.

Appendix B

BACKGROUND

Petitioner Leonardo Zuluaga Martinez ("Zuluaga"), a native and citizen of Colombia, entered the United States in April 1985. He became a legal permanent resident on December 1, 1990. On April 9, 1995, Zuluaga was arrested in Massachusetts for possession of heroin. This led to his conviction, in May 1998, based on a guilty plea to illegal possession of drugs and three counts of assault and battery, under Massachusetts law, for which he was sentenced to an 18 month term of imprisonment.

In June 1998, the Immigration and Naturalization Service ("INS") served Zuluaga with a notice to appear, charging him as removable under Immigration and Nationality Act ("INA") § 237(a)(2)(B)(i), for having "been convicted of a violation of ... any law or regulation of a State ... relating to a controlled substance." 8 U.S.C. § 1227(a)(2)(B)(i). In March 1999, petitioner was convicted a second time for illegal possession of heroin in violation of Massachusetts law, following an arrest on November 21, 1997. The INS thereupon charged Zuluaga as being additionally removable as an aggravated felon pursuant to INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii), based on the May 1998 convictions for assault and battery, and pursuant to INA § 237(a)(2)(B)(i), based on the March 1999 heroin conviction.

In May 1999, at a hearing before the Immigration

Judge ("IJ"), Zuluaga admitted to all of the above convictions. The IJ then found (1) that Zuluaga was removable from the United States and (2) that the *367 assault and battery offenses were aggravated felonies; the latter making Zuluaga statutorily ineligible for cancellation of removal under INA § 240A(a). *See* 8 U.S.C. § 1229b(a)(3). The IJ ordered Zuluaga removed to Colombia.

Zuluaga appealed to the Board of Immigration Appeals ("BIA"). In October 1999, while that appeal was pending, the Massachusetts state court granted Zuluaga's motion to vacate his assault and battery convictions because the trial court had failed to warn him about the immigration consequences of the plea. The BIA initially dismissed Zuluaga's appeal, but subsequently granted his motion to reopen based on Massachusetts's vacatur to allow Zuluaga to pursue cancellation of removal.

The IJ, on remand, then determined what lies at the heart of this appeal: that Zuluaga was still statutorily ineligible for cancellation of removal because he had failed to achieve seven years of continuous lawful permanent residence, as required under INA § 240A(a)(2), 8 U.S.C. § 1229b(a)(2). The IJ found that because Zuluaga had entered the country illegally without inspection, his period of lawful residence did not begin until May 4, 1988, the date he applied for temporary resident status. The IJ further determined that by operation of the stop-time rule of INA § 240A(d)(1), 8 U.S.C. §

1229b(d)(1)(B), which became effective according to IIRIRA on April 1, 1997, Zuluaga's period of continuous residence ended on April 9, 1995 when he committed his first drug offense, a month short of the seven years of continuous lawful permanent residence necessary for cancellation eligibility. The IJ denied Zuluaga's application for cancellation of removal and the BIA summarily affirmed.

The district court, upon a habeas petition, returned the case to the IJ, via the BIA, to determine whether Zuluaga might have been admitted earlier than May 4, 1988. But, after considering further evidence on the issue, the IJ confirmed his original determination, again denied relief, and ordered removal.

Zuluaga then moved for reconsideration of the IJ's decision, not arguing that the May 4, 1998 starting date for the seven year period was improper, but that the application of the stop-time rule which cut off the period just short of the seven years was impermissibly retroactive. The IJ declined reconsideration, relying on the BIA's decision in *In re Perez*, 22 I. & N. Dec. 689 (B.I.A.1999) (en banc), which had applied the stop-time rule to offenses preceding the passage of IIRIRA.

In November 2003, the BIA rejected Zuluaga's appeal. The BIA affirmed the IJ's conclusion that Zuluaga had failed to demonstrate the requisite seven years of continuous residence prior to the commission of his crime on April 9, 1995. Relying

also on *In re Perez,* the BIA concluded that the stop-time rule applied to Zuluaga's situation and precluded cancellation of removal. Zuluaga timely filed a petition for review of the BIA's decision.

DISCUSSION

Zuluaga does not challenge the agency's factual determination that his continuous residence "clock" began to run on May 4, 1988, but he argues that it did not stop on April 9, 1995. Zuluaga maintains that the criminal-offense stop-time rule, which became effective on April 1, 1997, is impermissibly retroactive as applied to criminal conduct that preceded its enactment. Zuluaga asks us to conclude (1) that the commission of the offense on April 9, 1995 did not stop the accrual of his seven years of permanent residence and (2) that he is therefore eligible for cancellation of removal. As a consequence, he asks us to *368 remand to the BIA for further remand to the IJ for a determination as to whether a favorable exercise of discretion is warranted.

A. Immigration Framework in 1995

Under the immigration laws in effect in April 1995, when Zuluaga committed the offense at issue, legal permanent residents who were subject to deportation, but who had resided in the United States for seven consecutive years, were eligible to apply for a discretionary waiver of deportation under INA § 212(c). *See* 8 U.S.C. § 1182(c)

(repealed 1996) ("Aliens lawfully admitted for permanent residence who temporarily proceeded abroad voluntarily and not under an order of deportation, and who are returning to a lawful unrelinquished domicile of seven consecutive years, may be admitted in the discretion of the Attorney General...."). Although "§ 212(c) was literally applicable only to exclusion proceedings," the BIA interpreted the provision "to authorize any permanent resident alien with 'a lawful unrelinquished domicile of seven consecutive years' to apply for a discretionary waiver from deportation." *INS v. St. Cyr*, 533 U.S. 289, 295, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001) (citing *In re Silva*, 16 I. & N. Dec. 26, 30 (B.I.A.1976) (adopting position of *Francis v. INS*, 532 F.2d 268 (2d Cir.1976))).

"The decision of whether to award section 212(c) relief involved only a balancing of the 'adverse factors evidencing an alien's undesirability as a permanent resident with the social and humane considerations presented in his behalf to determine whether the granting of [a section 212(c) waiver] appear [ed] in the best interests of this country.' " *Kai Tung Chan v. Gantner*, 464 F.3d 289, 295 (2d Cir.2006) (per curiam) (quoting *In re Marin*, 16 I. & N. Dec. 581, 584 (B.I.A.1978)) (alterations in original). Although the decision to grant § 212(c) relief was ultimately a discretionary one, a "substantial percentage" of applications were granted. *St. Cyr*, 533 U.S. at 296, 121 S.Ct. 2271 (noting that between 1989 and 1995, over 10,000

applicants obtained § 212(c) relief).

Under the pre-IIRIRA system then in existence, aliens accrued time toward their required period of continuous residence and physical presence until they applied for relief from deportation. *See* *Arenas-Yepes v. Gonzales*, 421 F.3d 111, 115 n. 4 (2d Cir.2005). This gave aliens an incentive to delay their deportation proceedings until they could fulfill the requisite seven years. *See* *Suassuna v. INS*, 342 F.3d 578, 581 (6th Cir.2003). Before IIRIRA, the accrual of time towards seven years of continuous residence was not stopped by the commission of a crime.

B. The Illegal Immigration Reform and Immigration Responsibility Act of 1996

IIRIRA, which was enacted on September 30, 1996 and went into effect on April 1, 1997, eliminated the § 212(c) waiver, and replaced it with cancellation of removal, "a more strict procedure." *United States v. Johnson*, 391 F.3d 67, 70 (2d Cir.2004). Under INA § 240A(a), which replaced INA § 212(c), a legal permanent resident alien must satisfy three conditions to qualify for cancellation of removal relief: the alien (1) must have been "lawfully admitted for permanent residence for not less than 5 years," (2) must have "resided in the United States continuously for 7 years after having been admitted in any status," and (3) must "not [have] been convicted of any aggravated felony." 8 U.S.C. § 1229b(a). The only

one of these conditions in dispute here is the continuous residency requirement of INA § 240A(a)(2).

***369 C. Whether Application of 8 U.S.C. § 1229b(d)(1)(B) to Zuluaga's Case Raises Retroactivity Concerns At All**

In addition to instituting this new cancellation of removal scheme, however, IIRIRA established a new stop-time rule in INA § 240A(d)(1) for calculating an alien's period of continuous residence or physical presence. It is this rule that the government says operates to cut off Zuluaga's continuous residence period and thereby destroys his eligibility for cancellation of removal.

The rule provides in relevant part that "any period of continuous residence or continuous physical presence in the United States shall be deemed to end ...*when the alien has committed an offense* referred to in section 1182(a)(2) of this title that renders the alien ... removable from the United States." 8 U.S.C. § 1229b(d)(1)(B) (emphasis added). Thus, it is the date of the commission of the offense-not the date of the subsequent conviction-that matters for purposes of computing an alien's period of continuous residence. *See Tablie v. Gonzales*, 471 F.3d 60, 62 (2d Cir.2006) ("Under subsection 240A(d)(1), called the 'stop-time rule,' the alien's continuous residency or physical presence ends, for purposes of cancellation of removal, *on the date he commits a qualifying*

offense or on the date a notice to appear is filed."(emphasis added)). If the stop-time rule applies to Zuluaga's situation, he is ineligible for cancellation of removal. However, because § 1229b(d)(1)(B) did not exist at the time Zuluaga committed the offense, we must ascertain whether the stop-time rule is or is not impermissibly retroactive as applied to his case. *See Landgraf v. USI Film Prods.*, 511 U.S. 244, 265, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994) (reciting the general principle that "the legal effect of conduct should ordinarily be assessed *under the law that existed when the conduct took place*" (quoting *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 855, 110 S.Ct. 1570, 108 L.Ed.2d 842 (1990) (Scalia, J., concurring)) (emphasis added)).[1]

D. Retroactivity Analysis under *Landgraf*

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[1] The government argues that our holding in *Domond v. INS*, 244 F.3d 81 (2d Cir.2001) requires a different result on this score. The government is incorrect. In *Domond*, we held that the aggravated felony bar of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), Pub.L. No. 104-132, § 440(d), 110 Stat. 1214, 1227 (1996), was not retroactive as applied to an alien whose criminal conduct pre-dated AEDPA, but whose conviction came after AEDPA's enactment. 244 F.3d at 86. This was so because "[w]hile the underlying criminal conduct is crucial to the conviction, it is not the conduct that bars relief under the statutory scheme." *Id.* By contrast, under § 1229b(d)(1)(B), it is the underlying criminal act-not the conviction-that triggers disqualification from relief. In this case, the underlying criminal conduct took place on April 9, 1995. Because the triggering conduct here took place prior to the effective date of the act, *Domond* is inapposite.

In *Landgraf*, the seminal case on retroactivity, the Supreme Court confirmed the continuing viability of the centuries-old presumption against retroactive legislation, emphasizing that "[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." *Id.* at 265, 114 S.Ct. 1483. At the same time, the Court acknowledged that Congress had the power, within constitutional limits, to enact laws with retroactive effect. It also observed that "[r]etroactivity provisions [in civil legislation] often serve entirely benign *370 and legitimate purposes, whether to respond to emergencies, to correct mistakes, to prevent circumvention of a new statute in the interval immediately preceding its passage, or simply to give comprehensive effect to a new law Congress considers salutary." *Id.* at 267-68, 114 S.Ct. 1483.

Based on the above principles, the *Landgraf* Court articulated a two-step test for determining when a statute could be applied retroactively. In the first step, the court must ascertain, using the ordinary tools of statutory construction, "whether Congress has expressly prescribed the statute's proper reach." *Id.* at 280, 114 S.Ct. 1483; *see also Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 126 S.Ct. 2422, 2428, 165 L.Ed.2d 323 (2006). If the answer is yes, the inquiry is over, and "there is no need to resort to judicial default rules." *Landgraf*,

511 U.S. at 280, 114 S.Ct. 1483. If, however, "the statute contains no such express command," the court must move on to the second step and decide whether application of the statute would have a genuinely "retroactive effect." *Id.* This is not always a simple task, because "[a] statute [is not impermissibly retroactive] merely because it is applied in a case arising from conduct antedating the statute's enactment, or upsets expectations based in prior law." *Id.* at 269, 114 S.Ct. 1483 (citation omitted). Rather, the court must assess "the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event," and determine "whether the new provision attaches new legal consequences to events completed before its enactment." *Id.* at 269-70, 114 S.Ct. 1483. If so, then the traditional presumption against retroactivity pertains and the new statute must be construed "as inapplicable to the event or act in question owing to the 'absen[ce of] a clear indication from Congress that it intended such a result.' " *Fernandez-Vargas*, 126 S.Ct. at 2428 (quoting *St. Cyr*, 533 U.S. at 316, 121 S.Ct. 2271) (alteration in original).

1. *Landgraf* Step One: Whether Congress Has Expressly Commanded That § 1229b(d)(1)(B) Be Applied to Pre-IIRIRA Conduct

Our analysis as to whether Congress expressly proscribed that the statute apply retroactively begins with an examination of the text. *See*

Robinson v. Shell Oil Co., 519 U.S. 337, 340, 117 S.Ct. 843, 136 L.Ed.2d 808 (1997). And on this score both parties agree that nothing in the language of 8 U.S.C. § 1229b(d)(1), or any other provision of the INA, explicitly directs that the criminal-offense stop-time rule be applied to pre-IIRIRA conduct. Significantly, Congress did include express statements in IIRIRA mandating the retroactive application of other provisions, such as the expanded definition of aggravated felony. *See* IIRIRA § 321(b), 110 Stat. at 3009-628 ("Notwithstanding any other provision of law (including any effective date), the term ["aggravated felony"] applies regardless of whether the conviction was entered before, on, or after [September 30, 1996]."); *see also St. Cyr*, 533 U.S. at 318-19, 121 S.Ct. 2271. The absence of such an express statement with respect to § 1229b(d)(1)(B) indicates "that Congress did not definitively decide the issue of [the provision]'s retroactive application to pre-enactment [conduct]." *St. Cyr*, 533 U.S. at 320, 121 S.Ct. 2271 (quotation marks omitted). We thus do not find that Congress has expressly prescribed the statute's reach.

Despite the absence of a clear textual command in § 1229b(d)(1)(B), the government argues that Congress plainly intended for the criminal-offense stop-time rule to apply retroactively. The government finds this intent in the transitional rule of IIRIRA § 309(c)(5). The government further*371 contends that this Court's recent decision in *Tablie*, which interpreted IIRIRA §

309(c)(5), compels denial of Zuluaga's petition.

IIRIRA § 309(c)(5) and *Tablie*, however, are not dispositive of this case. Unlike *Tablie*, this case is a permanent rule case: Because the proceedings against Zuluaga were *not pending* when IIRIRA was enacted or when it went into effect, the transitional rules do not apply. *See Arenas-Yepes*, 421 F.3d at 115; *see also* 143 Cong. Rec. S12658-01, at S12660 (1997) ("Section 203 modifies certain transitional rules established by IIRIRA with regard to suspension of deportation and cancellation of removal. The changes state that the 'stop time' rule established by that Act in section 240A of the INA shall apply generally to *individuals in deportation proceedings before April 1, 1997,* with certain exceptions.") (emphasis added). Thus the permanent provisions of IIRIRA govern Zuluaga's petition, *see Kuhali v. Reno*, 266 F.3d 93, 99 (2d Cir.2001), and, as already discussed, nothing in those provisions clearly mandates the retroactive application of § 1229b(d)(1)(B) to pre-IIRIRA conduct.

The government next argues that even if the transitional rule does not technically govern this case, it would be "incongruous" to "hold that the stop-time rule does not apply to [Zuluaga], where this Court has held that it applied to Tablie." Government's Reply Brief at 13. To avoid this incongruity, the government asks us to treat Zuluaga's case *as if it were* a transitional-rule case and, in support, cites two cases from other circuits,

Garcia-Ramirez v. Gonzales, 423 F.3d 935 (9th Cir.2005) (per curiam), and *Heaven v. Gonzales*, 473 F.3d 167 (5th Cir.2006).

We decline, however, to follow the path taken by the Fifth and Ninth[2] Circuits. Assuming that it would be "incongruous" for the stop-time rule to apply retroactively in transitional cases but not permanent-rule cases, that fact does not give us license to artificially stretch the transitional rules to cover this case. As one court correctly observed, "[s]ection 309(c)(5) shows ... that when Congress wanted the [stop-time] provision to apply retroactively to a limited category of cases-deportation cases pending when IIRIRA took effect-it said so clearly." *Henry v. Ashcroft*, 175 F.Supp.2d 688, 694 (S.D.N.Y.2001). Congress could have done the same for permanent-rule cases, but did not. We will not infer from this silence congressional intent for § 1229b(d)(1)(B) to apply

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2 We note that the Ninth Circuit has declined to follow *Garcia-Ramirez*'s approach in subsequent decisions. *See Valencia-Alvarez v. Gonzales*, 469 F.3d 1319, 1326-27, 1327 n. 10 (9th Cir.2006) (finding the language of IIRIRA insufficiently clear to infer an intent on the part of Congress to make § 1229b(d)(1)(B) retroactively applicable in permanent-rule cases); *Sinotes-Cruz v. Gonzales*, 468 F.3d 1190, 1199-201 (9th Cir.2006) (concluding that the question of § 1229b(d)(1)(B)'s temporal reach could not be resolved at step one of *Landgraf* because the language of the permanent provision "is ambiguous with respect to its retroactivity," and the "transitional rule does not clearly indicate that it is to be applied retroactively to part B of § 1229b(d)(1) in all circumstances").

retroactively in this case.

Amicus counsel, on the other hand, argues that Congress intended the opposite: that § 1229b(d)(1)(B) not be applied to pre-IIRIRA conduct in permanent-rule cases because "the plain language of the IIRIRA addressing the applicability of different bars to relief shows that Congress used express language when it chose to limit relief based on past events," and because "a backward looking interpretation would produce absurd results." *Amicus**372 Brief of Nancy Morawitz at 13. To the extent that there is any ambiguity, *amicus* counsel asserts that the rule of lenity requires that the ambiguity be resolved in Zuluaga's favor. We disagree.

[1][2] The absence of express language going to the temporal scope of a new statutory provision may indicate that Congress failed to specifically consider the issue. It does not, however, evince a clear intent to bar the application of a new provision to any case that somehow implicates past conduct or prior events. While there is a judicial presumption against retroactive application, that presumption operates only after the court determines, in step two of the *Landgraf* analysis, that the provision would have an impermissible retroactive effect as applied to the case at hand. In other words, silence or ambiguity in the statutory text and history requires the court to move on to step two, not to declare a victory for the opponent of retroactivity at step one. *See St. Cyr*, 533 U.S. at 320, 121 S.Ct.

2271.

Amicus counsel's absurdity argument is flawed for the same reason. The critical inquiry at step one of *Landgraf* is "whether Congress has expressly prescribed the statute's proper reach." *Landgraf*, 511 U.S. at 280, 114 S.Ct. 1483. Based on the relevant text, we conclude that it has not. Therefore, to determine whether § 1229b(d)(1)(B) may be applied to Zuluaga's 1995 offense, we must proceed to step two of the *Landgraf* inquiry.

2. *Landgraf* Step Two: Whether Application of § 1229b(d)(1)(B) to Zuluaga's Pre-IIRIRA Conduct Would Produce an Impermissible Retroactive Effect

[3] Before addressing the merits of step two, we pause to consider the extent of deference, if any, that is owed to the BIA's decision in *In re Perez*, 22 I. & N. Dec. 689, in which the BIA held that the stop-time rule does not have an impermissible retroactive effect as applied to an alien whose criminal conduct occurred prior to IIRIRA's passage. 22 I. & N. Dec. at 691. In general, when Congress has delegated authority to an agency to administer a statute, and "the statute is silent or ambiguous with respect to [a] specific issue," we must accord substantial deference to a reasonable interpretation given by the agency and cannot "simply impose [our] own construction on the statute." *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). "The BIA, through

powers delegated by the Attorney General, enforces and interprets the INA and thus has the authority to fill statutory gaps with reasonable interpretations." Blake, 498 F.3d at 100 (citing 8 U.S.C. § 1103(a)).

[4] As we have determined, IIRIRA is silent with respect to the specific issue in this case- § 1229b(d)(1)(B) retroactivity. Though statutory silence would ordinarily trigger Chevron deference, this principle does not hold when the issue is retroactivity, for a statute that is silent "with respect to retroactive application is construed under [the Supreme Court's] precedent to be unambiguously prospective" in effect. *St. Cyr*, 533 U.S. at 320 n. 45, 121 S.Ct. 2271. Accordingly, "there is, for *Chevron* purposes, no ambiguity in such a statute for an agency to resolve." *Id.*; *see also* *Henderson v. INS*, 157 F.3d 106, 130 (2d Cir.1998) ("[U]nder ordinary rules of statutory construction, a statute that is silent with respect to retroactivity is not 'ambiguous.' "). What remains to be determined is whether the provision would have an improper retroactive effect in the particular case; that inquiry, however, does not concern the sort of statutory gap that Congress has designated the BIA to fill, nor a *373 matter in which the BIA has particular expertise. *Cf.* *Gill v. INS*, 420 F.3d 82, 89 (2d Cir.2005) ("Because the BIA has expertise applying and construing immigration law, we afford *Chevron* deference to its construction of undefined statutory terms...."). We therefore decline to defer to the BIA's opinion in *In re Perez*

and proceed to make our own determination under *Landgraf*'s second step.

In *Landgraf*, the Supreme Court explained that a statute is impermissibly retroactive if it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." 511 U.S. at 269, 114 S.Ct. 1483 (quotation marks omitted). Each of the identified effects is "a *sufficient*, rather than a *necessary*, condition for invoking the presumption against retroactivity." *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 947, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997) (emphasis in original). In applying this framework we must exercise our "commonsense, functional judgment about whether the new provision attaches new legal consequences to events completed before its enactment." *St. Cyr*, 533 U.S. at 321, 121 S.Ct. 2271 (quotation marks omitted). Our analysis is further "informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations." *Id.* (quotation marks omitted).

[5] Exercising our "commonsense, functional judgment" leads us to conclude that § 1229b(d)(1)(B) would not have an impermissible retroactive effect if applied to Zuluaga's 1995 offense. As the Supreme Court has observed, whether "a particular application is retroactive will depen[d] upon what one considers to be the

determinative event by which retroactivity or prospectivity is to be calculated." *Republic Nat'l Bank of Miami v. United States*, 506 U.S. 80, 100, 113 S.Ct. 554, 121 L.Ed.2d 474 (1992) (Thomas, J., concurring) (emphasis and alteration in original) (internal quotation marks and citation omitted). As discussed above, the determinative event here happened when Zuluaga committed the drug offense and not when he was convicted. *See Landgraf*, 511 U.S. at 265, 114 S.Ct. 1483 ("[T]he legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place."(internal quotation omitted)). And while we note that it is sometimes proper to find that the determinative event is a date subsequent to the underlying criminal act when there is "relevant secondary *conduct*," *see St. Cyr v. INS*, 229 F.3d 406, 418 (2d Cir.2000) (emphasis added), there was no such secondary conduct here. After petitioner committed the offense, he did no more than passively await the outcome of his prosecution. Cf. *Id.*(finding date of underlying criminal conduct to be an inappropriate trigger for retroactivity analysis when there was a later "*decision* to enter a guilty plea to [the] crime"(emphasis added)(internal quotation marks and citation omitted)).

Because the trigger for retroactivity analysis here is the date that Zuluaga committed the drug offense, he cannot show that the new law attaches

a new disability on past acts.[3] Deportation is the *374 consequence he receives upon retroactive application of the stop-time rule just as it is the consequence he would have received immediately following his criminal conduct. The instant petitioner committed the offense before meeting the seven-year residency requirement for suspension of deportation, he became eligible for deportation. *See* Immigration and Nationality Act ("INA") § 237(a)(2)(B)(I), 8 U.S.C. § 1227(a)(2)(B)(I) ("Any alien who at any time after admission has been convicted of a violation of ... any law ... relating to a controlled substance ... other than a single offense involving [a small amount of marijuana for one's own use] is deportable."). That is, if petitioner had been captured and successfully prosecuted by plea, adverse jury verdict, or otherwise and the INS had obtained a deportation order promptly after he committed the offense, he could have been deported without the possibility of relief because he would not, at that time, have accrued the seven years required by the repealed INA § 212(c). It was only the time required to bring an offender to justice

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[3] Zuluaga does not appear to argue that his case falls within Justice Story's category of retroactivity pertaining to the cancellation of "vested rights." In any event, such an argument would be without merit because the Supreme Court has cautioned that "cancellation of removal ... [and other] putative claims to relief are not 'vested rights,' a term that describes something more substantial than inchoate expectations and unrealized opportunities." *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 126 S.Ct. 2422, 2432 n. 10, 165 L.Ed.2d 323 (2006).

that pushed the disposition of his case beyond the seven-year threshold. But this lapse of time, in the absence of circumstances requiring additional retroactivity scrutiny, such as subsequent conduct in reliance on the then-existing state of the law or the creation of a vested right after the criminal act, does not create a material difference for retroactivity purposes between an alien in Zuluaga's situation and an alien who was successfully convicted and deported prior to accruing seven years of continuous residence.

Our view is supported by the facts of *Landgraf* itself. There, the Supreme Court considered the retroactivity of § 102 of the Civil Rights Act of 1991, which "significantly expand[ed] the monetary relief" available to plaintiffs who proved intentional employment discrimination under Title VII of the Civil Rights Act of 1964. *Landgraf*, 511 U.S. at 253, 114 S.Ct. 1483. Prior to the 1991 Act, Title VII plaintiffs could only recover backpay; afterwards, as a result of § 102, plaintiffs who won a backpay award could recover compensatory and punitive damages as well. *See id.* at 253-54, 114 S.Ct. 1483. The Court acknowledged that "concerns of unfair surprise and upsetting expectations [were] attenuated in the case of intentional employment discrimination, which ha[d] been unlawful for more than a generation" prior to the 1991 Act. *Id.* at 283 n. 35, 114 S.Ct. 1483. The Court nonetheless concluded that "the new compensatory damages provision would operate 'retrospectively' if it were applied to

conduct occurring before [the enactment of the 1991 Act]," because it would place a new legal burden on past conduct:

> Unlike certain other forms of relief, compensatory damages are quintessentially backward looking.... In this case, the event to which the new damages provision relates is the discriminatory conduct of respondents' agent John Williams; if applied here, that provision would attach an important new legal burden to that conduct. The new damages remedy in § 102, we conclude, is the kind of provision that does not apply to events antedating its enactment in the absence of clear congressional intent.

Landgraf, 511 U.S. at 282-83, 114 S.Ct. 1483.

The relationship between the consequences of a new law and the conduct pre-dating the new law is an important one for retroactivity analysis. *See* *Landgraf*, 511 U.S. at 270, 114 S.Ct. 1483 ("The conclusion that a particular rule operates 'retroactively'*375 comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event."). And what was present in *Landgraf*, but is absent here, is changed consequences. *See* *id.* at 283, 114 S.Ct. 1483. The statute in *Landgraf* was impermissibly retroactive because it would allow the recovery of compensatory damages that were not recoverable

under the law that existed when the conduct at issue occurred. In contrast, IIRIRA, as applied to petitioner here, did not change the consequence of petitioner's criminal act. Zuluaga's commission of the crime charged immediately placed him in a category of aliens eligible for deportation upon conviction.

Our decision remains sound when reasonable reliance is taken into consideration.[4] In many

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[4] The concurrence argues, in essence, that reliance is the only factor relevant to retroactivity analysis in immigration cases in this Circuit. That is, the concurrence argues that "in our Circuit, petitioners ... must show that they detrimentally relied on the prior law." But we have never stated that petitioners must show reliance in every case. While it is clear that reliance has played an important role in our retroactivity cases in the immigration context, the fact that one factor may be determinative in certain cases does not mean that it is the only determinative factor in every case. Indeed, in *Domond v. INS*, 244 F.3d 81 (2d Cir.2001), we undertook the same analysis as the majority opinion now takes. After stating that the question before the court was "whether the lack of discretionary relief applies to aliens whose criminal conduct pre-dates enactment of AEDPA," and after finding that the statute was ambiguous, we proceeded under *Landgraf*'s second step to ascertain whether the statute "imposes 'new legal consequences to events completed before its enactment.' " *Id.* at 85 (internal citation omitted). We also said we would "rely on 'familiar considerations of fair notice, reasonable reliance, and settled expectations' for guidance in determining retroactive effect." *Id.* (internal citation omitted).

Under *Landgraf*'s second step in *Domond* we then held "that Section 440(d) imposes no *new legal consequences* on aliens

cases regarding impermissible retroactivity in the immigration context, the issue of reliance plays a central role in the court's analysis. In *St. Cyr*, the Supreme Court emphasized that St. Cyr, and many others in his situation, had pled guilty and waived their right to a trial in reliance on the continued availability of § 212(c) relief. *See* *St. Cyr*, 533 U.S. at 323, 121 S.Ct. 2271 ("Relying upon settled practice, the advice of counsel, and perhaps even assurances in open court that the entry of the plea would not foreclose § 212(c) relief, a great number of defendants in [petitioners'] position agreed to plead guilty."). Following *St. Cyr*, this Court has likewise focused on the concept of detrimental reliance in analyzing the effect of IIRIRA's repeal of § 212(c) on aliens previously convicted of aggravated felonies. *See* *Rankine v. Reno*, 319 F.3d 93, 100 (2d Cir.2003) (holding that the repeal of § 212(c) was not impermissibly retroactive as

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like Domond whose conduct pre-dates AEDPA, but whose convictions came after AEDPA's enactment." *Id.* (emphasis added). The panel in *Domond* reached this conclusion, as the majority opinion does, because "[d]eportation was always the consequence" of the petitioner's criminal conduct. Finally after engaging in the foregoing reasoning we added: "*[n]or* does Domond's loss of the Section 212(c) hearings in these circumstances raise the same reliance and expectation concerns raised in *St. Cyr*." *Id.*(emphasis added). As the conjunction "nor" indicates, reliance was not even the first, much less the only factor the Court analyzed under *Landgraf*'s second step. We therefore disagree with our colleague that reliance is the sole factor considered in our jurisprudence in immigration cases raising retroactivity concerns.

applied to aliens who were convicted following jury trial prior to the repeal, because they could not show that they "chose to go to trial in reliance on the *376 availability of § 212(c) relief"). *But see* *Restrepo v. McElroy*, 369 F.3d 627, 634 (2d Cir.2004) (clarifying that the repeal could have an improper retroactive effect as to an alien who, after losing at trial, "decid[ed] to forgo the immediate filing of a 212(c) application based on the considered and reasonable expectation that he would be permitted to file a stronger application for 212(c) relief at a later time"); *see also* *Wilson v. Gonzales*, 471 F.3d 111, 122 (2d Cir.2006) (requiring that aliens who claim to have "delayed filing an affirmative § 212(c) application to build a stronger case warranting the granting of that relief" to make an individualized showing of reliance).

When, as in the above cases, the relevant conduct is a legal decision[5] *e.g.*, the decision to plead guilty or

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[5] *See* *St. Cyr v. INS*, 229 F.3d 406, 418 (2d Cir.2000) ("'[I]t is the conviction, not the underlying criminal act, that triggers the disqualification from § 212(c) relief.' Thus, in considering whether the changes to the availability of discretionary relief would alter the legal effect of conduct that predates the AEDPA and IIRIRA's enactment, our analysis focuses on the decision to enter a guilty plea to a crime-not on the criminal conduct-that qualifies the alien for removal under the immigration laws."(citation omitted)); *see also id.* at 419 ("[A] legal resident who is charged with a crime that renders him removable from the United States carefully considers the immigration consequences of his or her conviction and, specifically, the availability of discretionary

go to trial-it makes sense to focus on whether the alien detrimentally relied upon the then-existing law in making the decision. On the other hand, it makes no sense at all to ask whether an alien, in committing a drug trafficking offense, acted with "an intention to preserve [his or her] eligibility for relief under § 212(c)," *Rankine*, 319 F.3d at 100, or in an effort to "conform[ ] his or her conduct according to the availability of relief," *St. Cyr*, 229 F.3d at 420. Cf. *St. Cyr*, 229 F.3d at 418 (noting the absurdity of the notion that aliens committed drug crimes in reliance on the continued availability of discretionary relief). We therefore conclude that Zuluaga cannot show a protectable reliance interest here.

Moreover, even if Zuluaga were to have somehow improbably relied on the absence of the stop-time rule when he committed the offense, as explained above, the retroactive application of the stop-time rule did not alter the legal consequence of his actions. And there was no subsequent reliance because Zuluaga did not later enter into a transaction or engage in conduct in reliance on the availability of discretionary relief. *See Rankine v. Reno*, 319 F.3d 93, 100 (2d Cir.2003) ("[P]etitioners neither did anything nor surrendered any rights that would give rise to a comparable reliance

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relief from removal. It is not unreasonable to attribute knowledge of the availability of relief to a legal resident because it is a common requirement that defense counsel and the court advise a criminal defendant of the immigration consequences of a guilty plea.").

interest."). Petitioner did nothing except wait while the criminal justice process ran its course.

Additionally, taking into account "familiar considerations of fair notice ... and settled expectations," *INS v. St. Cyr*, 533 U.S. 289, 321, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001)(internal quotation marks and citation omitted), we fail to see how either of these guiding principles was contravened in the instant case. Fair notice was not violated because the law was certain at the time Zuluaga acted. He would have been deportable without possibility of discretionary relief had he been convicted before he accrued seven years. *See*8 U.S.C. § 1227(a)(2)(B)(i). And settled expectations were not disrupted because, assuming that Zuluaga expected anything with respect to deportation when he committed*377 the offense, his expectation could not have been anything other than that he was subject to deportation without the opportunity for discretionary relief.

In sum, we conclude that applying § 1229b(d)(1)(B) to Zuluaga's pre-IIRIRA offense would not produce an impermissible retroactive effect.

CONCLUSION

For the foregoing reasons, the petition for review is DENIED.

STRAUB, Circuit Judge, concurring.
I write separately because I disagree with the majority that retroactive application of the stop-time rule to Zuluaga's case "did not change the consequence of petitioner's criminal act." Nevertheless, because Zuluaga cannot meet this Circuit's requirement that he show actual, detrimental reliance on the prior law in order to demonstrate impermissible retroactive effect (a requirement that, as explained in more detail below, is the subject of considerable controversy and may be ripe for re-examination or review), I must concur in the judgment.

I.

I agree with the majority that Congress has not expressly commanded that the criminal-offense stop-time rule in 8 U.S.C. § 1229b(d)(1)(B) be applied retroactively so that we must address *Langraf* step two. It is at the determination of whether the new stop-time rule attaches adverse legal consequences or new disabilities to past acts where the majority and I part ways.

In concluding that retroactive application of the stop-time rule "did not change the consequence of petitioner's criminal act," the majority reasons: "The instant petitioner committed the offense before meeting the seven-year residency requirement for suspension of deportation, he became eligible for deportation." On this score, the majority is simply wrong as a matter of law.

Section 237(a)(2)(B)(i) of the INA, under which Zuluaga was charged with removability, states, in relevant part: "Any alien who at any time after admission *has been convicted* of a violation of ... any law ... relating to a controlled substance ... is deportable."8 U.S.C. § 1227(a)(2)(B)(i) (emphasis added); *see also* *Thom v. Ashcroft*, 369 F.3d 158, 170 (2d Cir.2004) (Underhill, J., dissenting) ("The instant before the jury returns its verdict, the defendant is subject to no immigration consequence; the instant after, he is subject to an immigration consequence."), *cert. denied*, 546 U.S. 828, 126 S.Ct. 40, 163 L.Ed.2d 75 (2005); *Rankine v. Reno*, 319 F.3d 93, 99 (2d Cir.) ("*Unless and until they were convicted* of their underlying crimes, the petitioners could not be deported."(emphasis added)), *cert. denied*, 540 U.S. 910, 124 S.Ct. 287, 157 L.Ed.2d 199 (2003); *St. Cyr v. INS*, 229 F.3d 406, 418 (2d Cir.2000) ("[I]t is the conviction, not the underlying criminal act, that triggers the disqualification from § 212(c) relief."(internal quotation marks omitted)), *aff'd*, 533 U.S. 289, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001); *accord* *Atkinson v. Att'y Gen.*, 479 F.3d 222, 231 n. 8 (3d Cir.2007) ("[A]bsent a legal determination of guilt, the alien is not subject to deportation or in need of section 212(c) relief."). Accordingly, at the time Zuluaga *committed* his offense, he was not deportable, as the majority suggests. It was only after his *conviction* that Zuluaga became deportable. And at the time he was convicted, and ultimately placed into removal proceedings, Zuluaga had clearly met the seven-year residency

requirement.

Under the prior law, therefore, the timing of the commission of his offense posed no bar whatsoever to Zuluaga's ability to *378 apply for a waiver of deportation, which he could do at any time before a final order of removal was entered, so long as that final order of removal was entered after he had acquired his seven years of residency, which in this case it clearly was. *See* *Arenas-Yepes v. Gonzales*, 421 F.3d 111, 115 n. 4 (2d Cir.2005) ("Prior to IIRIRA, aliens accrued time toward the continuous physical presence in the United States requirement until they *applied* for suspension of deportation. In short, the commencement of deportation proceedings had no effect on this accrual."(emphasis added) (internal quotation marks omitted)). However, the new stop-time rule, retroactively applied, would prohibit Zuluaga from obtaining relief from removal *from the time he committed the offense*, regardless of when he was convicted, served with an NTA, or ordered removed. Retroactively applying the stop-time rule makes the timing of his offense determinative, and therefore attaches new and adverse legal consequences and new disabilities to past acts. *See* *INS v. St. Cyr*, 533 U.S. 289, 325, 121 S.Ct. 2271, 150 L.Ed.2d 347 (2001).

The majority hinges its decision on the unlikely hypothetical possibility that Zuluaga could have been convicted, placed into removal proceedings, and ordered removed, all within the one month

after he committed the offense and before he acquired his seven years of residency.[1] A far more likely scenario reveals the majority's flawed reasoning. Had Zuluaga been convicted of his April 1995 offense and placed into removal proceedings at any time between May 1995, when he accrued his seven years of residence, and April 1, 1997, the date IIRIRA became effective, Zuluaga unquestionably would have been eligible to apply for suspension of deportation. *See* 8 U.S.C. § 1182(c) (repealed 1996); *Arenas-Yepes*, 421 F.3d at 115 n. 4. Accordingly, the delay in "time required to bring an offender to justice" was just as much, if not more, a detriment to Zuluaga's case as it was a benefit.

In any event, resort to hypothetical scenarios is unnecessary here, because the events that actually transpired in Zuluaga's case demonstrate clearly that retroactive application of the stoptime rule attached "new legal consequences" to Zuluaga's past conduct. *St. Cyr*, 533 U.S. at 321, 121 S.Ct. 2271. At the time Zuluaga was convicted and placed into removal proceedings, he would have

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[1] The majority again errs when it states that Zuluaga "would have been deportable without possibility of discretionary relief had he been convicted before he accrued seven years." In fact, Zuluaga would only have been deportable "without possibility of discretionary relief" had he been convicted, served with an NTA, and ordered removed before he had accrued his seven years residency, which occurred one month after he committed the offense. *See Arenas-Yepes*, 421 F.3d at 115.

been eligible to apply for suspension of deportation under the prior law, because he had clearly met the seven-year residency requirement. When the IJ retroactively applied the new stop-time rule to his pre-IIRIRA conduct, however, Zuluaga was stripped of that eligibility. I fail to see how retroactive application of the new stop-time rule did not attach a "new legal consequence[ ]" or "new disability," *St. Cyr*, 533 U.S. at 321, 121 S.Ct. 2271, to a past act that Zuluaga was "helpless to undo," *Fernandez-Vargas v. Gonzales*, 548 U.S. 30, 126 S.Ct. 2422, 2432, 165 L.Ed.2d 323 (2006). *See also Landgraf v. USI Film Prods.*, 511 U.S. 244, 269, 114 S.Ct. 1483, 128 L.Ed.2d 229 (1994).

I therefore disagree with the majority's view that retroactive application of the stop-time rule "did not change the consequence of petitioner's criminal act." Although*379 IIRIRA did not change the impact of Zuluaga's offense on the initial determination of deportability, it changed the consequence of the *timing* of his criminal act by eliminating the possibility of relief from removal that was previously available to him. *See St. Cyr*, 533 U.S. at 325, 121 S.Ct. 2271 ("There is a clear difference, for the purposes of retroactivity analysis, between facing possible deportation and facing certain deportation."). Accordingly, in my view, applying § 1229b(d)(1)(B) to Zuluaga's pre-IIRIRA offense attaches unforeseen, and severe, legal consequences to past conduct that cannot be undone. And since there is no clear indication in IIRIRA that Congress "affirmatively considered the

potential unfairness of retroactive application and determined that it is an acceptable price to pay for the countervailing benefits," *Landgraf*, 511 U.S. at 272-73, 114 S.Ct. 1483, the presumption against retroactivity counsels against allowing § 1229b(d)(1)(B) to apply to past conduct. Nevertheless, as explained below, because Zuluaga cannot demonstrate the type of detrimental reliance required by our precedent, I must concur in the majority's finding that he cannot demonstrate impermissible retroactive effect.

II.

Our post-*St. Cyr* decisions make clear that, even in cases where a new immigration law attaches new legal consequences to past conduct, in our Circuit, petitioners seeking to show that the new law was impermissibly applied to their case retroactively must show that they detrimentally relied on the prior law.

In *St. Cyr*, the Supreme Court was asked to decide whether the repeal of § 212(c) relief could be retroactively applied to petitioners who had pled guilty to their removable crimes while § 212(c) was still in effect. Although the Court found that the provision could not be retroactively applied, emphasizing that St. Cyr, and many others in his situation, had pled guilty and waived their right to a trial in reliance on the continued availability of § 212(c) relief, the Court stopped short of stating that such reliance must always be shown in order to

sustain a finding of impermissible retroactivity. Nevertheless, in *Rankine*, a panel of this Court, reasoning that it could not "ignore the strong signals sent in [the Supreme Court's decision] that aliens who chose to go to trial are in a different position with respect to IIRIRA than aliens like St. Cyr who chose to plead guilty," held that because aliens who were convicted at trial before repeal of § 212(c) could not show that they "detrimentally changed [their] position in reliance on continued eligibility for § 212(c) relief," the new law was not impermissibly retroactive as applied to them. 319 F.3d at 99-100. Reasoning that what such petitioners "truly relied upon was their claim of innocence," the panel found it "difficult to conclude, *as we must to find impermissible retroactivity*, that the petitioners chose to go to trial in reliance on the availability of § 212(c) relief." *Id.* at 100-02 (emphasis added). Significantly, after finding that petitioners could not show detrimental reliance on the prior law, the analysis ended. This Court did not go on to examine "whether the new provision attaches new legal consequences to events completed before its enactment," *Landgraf*, 511 U.S. at 269-70, 114 S.Ct. 1483, which it most certainly did.[2] Accordingly, in this case, although in my view application*380 of the stop-time rule

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[2] Indeed, the "new legal consequences" for the petitioners in *Rankine* were the same as those for St. Cyr. The only difference between the two is that while St. Cyr had pled guilty prior to enactment of the new law, the petitioners in *Rankine* were convicted at trial prior to enactment of the new law.

attaches new legal consequences to Zuluaga's crime, *Rankine* forecloses relief. Under our precedent, in order to successfully argue that the rule is impermissibly retroactive as applied to his case, Zuluaga must show that he detrimentally relied on the prior rule, which, as shown below, he cannot do.

Following *Rankine*, several decisions from this Court have further made clear that we require a showing of actual detrimental reliance. *See, e.g., in chron. order,* *Swaby v. Ashcroft*, 357 F.3d 156, 162 (2d Cir.2004) ("We hold that the decision to go to trial, as a matter of law, forecloses any argument of detrimental reliance on the availability of § 212(c) relief, and that IIRIRA's repeal of § 212(c) is not impermissibly retroactive in its application to petitioner."); *Restrepo v. McElroy*, 369 F.3d 627, 637 (2d Cir.2004) (finding that petitioners who forwent "filing an affirmative [§ 212(c)] application in the hope of building a stronger record and filing at a later date" could show detrimental reliance under *Rankine*); *Boatswain v. Gonzales*, 414 F.3d 413, 419 (2d Cir.) ("[In *Rankine*], we looked for some indication of a *quid pro quo,* or reasoned exchange, wherein the individual whose settled expectations were in question relied on a potential benefit in structuring his conduct."), *cert. denied,* 546 U.S. 945, 126 S.Ct. 445, 163 L.Ed.2d 338 (2005); *Wilson v. Gonzales*, 471 F.3d 111, 122 (2d Cir.2006) ("The precedential evolution from *St. Cyr*, to *Rankine*, to *Restrepo*, through to *Fernandez-Vargas*, makes clear that the continued

availability of § 212(c) relief depends on the reliance of those now seeking the benefit of that relief.");[3] *Walcott v. Chertoff*, 517 F.3d 149, 155 (2d Cir.2008) ("[W]e hold that § 212(c) relief remains available to an alien ordered removed for a pre-AEDPA conviction that was on appeal when the AEDPA took effect, provided that the alien can prove detrimental reliance of the type recognized in *Restrepo*.... [T]he proper inquiry is whether, prior to the AEDPA's passage, an alien reasonably and detrimentally conformed his conduct to the then-prevailing law by making choices intended to preserve or heighten his chances of receiving § 212(c) relief."); *Singh v. Mukasey*, No. 07-1688-ag, 520 F.3d 119, 124-25 (2d Cir.2008) (stating that "*Wilson* requires" a "showing of detrimental reliance").[4]

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[3] While this passage appears to suggest that the Supreme Court in *Fernandez-Vargas* required a showing of detrimental reliance, as explained in more detail in section III below, I believe such a suggestion is unsupportable.

[4] Contrary to the majority's assertion, I in no way intend to suggest that "reliance is the only factor relevant to retroactivity analysis in immigration cases in this Circuit," or that it is the "sole factor considered in our jurisprudence in immigration cases raising retroactivity concerns." Rather, my view is that under our precedent a showing of reliance is necessary, though not always sufficient, to demonstrate impermissible retroactive effect. Some other factor-for example failure to show retroactive application or effect of the new law-could also doom a petitioner's claim. *See, e.g.*, *Fernandez-Vargas*, 126 S.Ct. at 2434 ("Because we conclude that § 241(a)(5) has no retroactive effect when applied to aliens like Fernandez-Vargas, we affirm the judgment of the Court of Appeals."); *Puello v. BCIS*, 511 F.3d 324, 333 (2d

***381** Moreover, we have further held that, as a general matter, petitioners must show that their

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Cir.2007) ("Puello's claim is without merit because the amendments were not applied retroactively to him.").

To the extent the majority argues that our Court does not require a showing of reliance in cases where new legal consequences have attached to past acts, this contention—though appealing for the reasons set forth in section III below—is, in my view, unsupportable. *Domond v. INS*, 244 F.3d 81 (2d Cir.2001), relied on by the majority, was decided before the Supreme Court decided *St. Cyr*, and, as stated above, our post-*St. Cyr* precedent—relying on the "strong signals" we perceived the Supreme Court to have sent out in *St. Cyr*—has since held that a showing of reliance is required. *Rankine*, 319 F.3d at 99. Indeed, *Rankine* cannot be read in any other manner. *See, e.g.*, *Thom*, 369 F.3d at 163 n. 6. Moreover, the manner in which we held that *Domond* remains good law after *St. Cyr* further demonstrates that after *St. Cyr*, reliance is viewed as a requirement in our Circuit. *See Khan v. Ashcroft*, 352 F.3d 521, 523 (2d Cir.2003) ("[W]hereas in *St. Cyr[ ]*, the alien's plea of guilty prior to the passage of AEDPA § 440(d) could have been entered in reliance on the possibility of being granted a § 212(c) discretionary waiver of deportation, in *Domond* we noted that, in contrast, 'it cannot reasonably be argued that aliens committed crimes in reliance on' such a possibility."(quoting *Domond*, 244 F.3d at 86)). Finally, the majority does not, and in my view cannot, square the contention that reliance is not required with the reasoning and holding of *Rankine* and its progeny (as set forth above), nor does it address decisions from other circuits (as set forth below), which have explicitly recognized our controversial reliance requirement.

reliance was individualized and subjective, not merely objective. *See* *Wilson*, 471 F.3d at 122. In *Restrepo*, while we found that petitioners who forwent "filing an affirmative [§ 212(c)] application in the hope of building a stronger record and filing at a later date" could show the type of detrimental reliance required by *Rankine*, we left open the question of whether an alien "must make an *individualized* showing that he decided to forgo an opportunity to file for 212(c) relief in reliance on his ability to file at a later date ... or whether, instead, a *categorical* presumption of reliance by any alien who might have applied for 212(c) relief when it was available, but did not do so, is more appropriate." 369 F.3d at 637-39. In *Wilson*, we answered this question, holding that, as a general matter, the former is required. 471 F.3d at 122.

Here, Zuluaga cannot show the type of individualized, detrimental reliance on pre-IIRIRA law required by *Rankine* and *Wilson*. As the majority correctly states, the operative event in Zuluaga's case is his commission of the crime. However, any argument that Zuluaga committed the crime in reliance on his future eligibility for suspension of deportation under pre-IIRIRA law is foreclosed by our precedent. In *Domond*, relying on our decision in *St. Cyr*, we stated that "it would border on the absurd to argue that [the petitioner] would have decided not to commit a crime if he had known that he ... could face deportation without the availability of a discretionary waiver of deportation." 244 F.3d at 86 (alterations and

internal quotation marks omitted); *see also* *Khan*, 352 F.3d at 524-25 (holding that *Domond* remains good law after the Supreme Court's *St. Cyr* decision and explicitly citing *Domond* with approval on this point).[5] Accordingly,*382 Zuluaga cannot show that application of the stop-time rule to his case was impermissible under our precedent.[6]

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[5] While we have rejected this argument as "border[ing] on the absurd," I note that whether it should be rejected at all is subject to dispute. *See, e.g.*, *Thom*, 369 F.3d at 168 n. 2 (Underhill, J., dissenting) ("I note that this oft-quoted passage is one that conflicts with my 'sound instincts' as a judge. If it is, indeed, absurd to suggest that a person contemplating the commission of a crime considers the potential consequences of criminal conduct, then Congress and the Sentencing Commission surely are misguided in their attempts to deter crime through increased sentences. I respectfully suggest that it is far from absurd to believe the prospect of certain deportation, rather than possible deportation, might well deter a significant number of aliens from committing aggravated felonies."(citing *Landgraf*, 511 U.S. at 270, 114 S.Ct. 1483)); *Restrepo*, 369 F.3d at 632 n. 8 ("We ... note that, in the context of criminal sanctions, similar retroactive increases in penalties have been considered to raise serious concerns under the Ex Post Facto Clause, presumably because they violate notice rather than reliance interests."(internal citation omitted)); *Beharry v. Reno*, 183 F.Supp.2d 584, 590 (E.D.N.Y.2002) (Weinstein, J.) ("The court of appeals' argument in *Domond*... might be viewed by some as missing the mark."), *rev'd on jurisdictional grounds*, 329 F.3d 51 (2d Cir.2003); *see also* *St. Cyr*, 229 F.3d at 419 ("[L]awful permanent residents are typically part of a resident alien community and are likely aware of what happens to other members of the community who engage in criminal conduct.").

[6] Zuluaga argues that "[h]ad he been aware at the time he entered his guilty plea that his eligibility for relief from

III.

The requirement that petitioners arguing impermissible retroactivity show individualized, detrimental reliance on the prior law is the subject of a considerable amount of controversy among, within, and surrounding the courts of appeals.

As various courts have noted, the requirement has not been imposed by, and in fact appears to run afoul of, Supreme Court retroactivity case law. In *Landgraf*, the Supreme Court was asked to decide whether provisions of the Civil Rights Act of 1991 permitting a plaintiff to recover damages for unlawful discrimination could be retroactively applied to the actions of Barbara Landgraf's employer. The Court found that "the new compensatory damages provision would operate 'retrospectively' if it were applied to conduct

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removal would be pretermitted, he would have considered foregoing the plea." Even if we were to view the conviction as the operative event for determining whether settled expectations were upset, however, such an argument is foreclosed by our precedent. *See* *Domond*, 244 F.3d at 86 (holding that aliens who entered guilty pleas after the new law went into effect could not establish impermissible retroactivity); *Khan*, 352 F.3d at 524 ("*St. Cyr II*, like *Domond*, evaluated aliens' expectations in light of 'the time of their plea *under the law then in effect*.' ") (citing *St. Cyr*, 533 U.S. at 326)(emphasis added). Zuluaga and amicus advance no other reliance arguments. Accordingly, I take no view as to whether Zuluaga might have some other colorable reliance claim under *Restrepo*, *Wilson*, of their progeny.

occurring before [enactment of the 1991 Act]" because it would "attach an important new legal burden to that conduct." 511 U.S. at 282-83, 114 S.Ct. 1483. As the Third Circuit later observed, "[i]n determining that the amendment did not apply to pending cases, the Court did not base its decision on the specific conduct of Landgraf's employer or on any reliance that either Landgraf or her employer may have had on the state of the law when discriminatory conduct occurred." *Atkinson*, 479 F.3d at 228. "Instead, the Court made a general analysis of the impact of the amendment, finding retroactivity improper because the amendment instituted a legal change that attached a new legal burden to the proscribed conduct." *Id.*; *see also Hem v. Maurer*, 458 F.3d 1185, 1192 (10th Cir.2006) ("The facts of *Landgraf* itself belie any notion that the Supreme Court requires a showing of actual reliance as a prerequisite to sustain a retroactivity challenge."). The *Landgraf* Court accordingly affirmed that " 'every statute, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past, must be deemed retrospective.' " 511 U.S. at 269, 114 S.Ct. 1483 (quoting *Society for Propagation of the Gospel v. Wheeler*, 22 F. Cas. 756, 767 (C.C.N.H.1814) (No. 13,156) (Story, J.)).

Similarly, in *Hughes Aircraft Co. v. United States ex rel. Schumer*, 520 U.S. 939, 117 S.Ct. 1871, 138 L.Ed.2d 135 (1997), the Supreme Court held that a

1986 amendment to the False Claims Act (FCA), which eliminated certain defenses to suits under the FCA, could not be retroactively applied to suits based on pre-enactment conduct. *Id.* at 947-48, 117 S.Ct. 1871. "There [was], however, no consideration in *Hughes* of whether Hughes Aircraft, in particular, or any defendant, in general, in an FCA action might have relied on the former law in conducting business with the government." *Atkinson*, 479 F.3d at 229. "It was the new legal burden imposed on events past, rather than the ***383** reliance on the former law by the person affected, which was the basis for holding that the 1986 amendment would not be applied retroactively." *Id.; see also Hem*, 458 F.3d at 1193 (" *Hughes Aircraft*... similarly failed to impose any reliance requirement on retroactivity challenges."); *Olatunji v. Ashcroft*, 387 F.3d 383, 391 (4th Cir.2004) (explaining that *Hughes Aircraft* confirms that " *Landgraf* did not intend to impose a requirement of reliance" because there the Court held that "elimination of certain defenses to *qui tam* suits under the False Claims Act could not be applied retroactively to Hughes Aircraft ...*without even a single word of discussion as to whether Hughes Aircraft or, for that matter, similarly situated government contractors had relied on the eliminated defense to its detriment*"). Moreover, the *Hughes Aircraft* Court stated that *Landgraf*s description was not "the exclusive definition of presumptively impermissible retroactive legislation," and thus, each of the identified effects is "a *sufficient*, rather than a *necessary*, condition

for invoking the presumption against retroactivity." 520 U.S. at 947, 117 S.Ct. 1871.

Recent Supreme Court cases in the immigration context do not cast doubt on this interpretation. In *St. Cyr*, as stated above, the Supreme Court admittedly considered the fact that aliens had relied on the availability of § 212(c) relief in deciding to plead guilty; however, the Court stopped short of stating that such reliance was required for a finding of impermissible retroactivity. *See* *Olatunji*, 387 F.3d at 393 (stating that " *St. Cyr* did not purport to add a subjective reliance requirement," but rather that the Court in *St. Cyr* emphasized petitioner's reliance because it indicated " 'an *obvious and severe* retroactive effect.' " (citing *St. Cyr*, 533 U.S. at 325, 121 S.Ct. 2271)). And, in *Fernandez-Vargas*, the Supreme Court held that an IIRIRA provision for the reinstatement of removal orders against aliens illegally reentering could be permissibly applied to aliens who reentered the United States before IIRIRA became effective. 126 S.Ct. at 2434.

However, the Court based its holding not on reliance grounds, but on the finding that the new law does not impose new legal consequences on past conduct that could not be undone. The Court reasoned, "[i]t is ... the alien's choice to continue his illegal presence, after illegal reentry and after the effective date of the new law, that subjects him to the new and less generous legal regime, not a past act that he is helpless to undo." *Id.* at 2432; *see also* *Hem*, 458 F.3d at 1198-99 ("The problem with

Fernandez-Vargas' *Landgraf* argument, the majority reasoned, was that § 241(a)(5) did not affect his *past* conduct."). As the Tenth Circuit observed, "[c]onsistent with ... the *Landgraf* cases, the [*Fernandez-Vargas*] Court never converts 'detrimental reliance' on prior law into a prerequisite for sustaining a retroactivity claim. Rather, the retroactivity inquiry remains the two part inquiry established in *Landgraf*, together with a strong presumption against retroactive application, with no discussion of reliance even appearing until the Court summarizes the pertinent facts of St. Cyr." *Hem*, 458 F.3d at 1198-99 (citing *Fernandez-Vargas*, 126 S.Ct. at 2428); *see also United States v. De Horta Garcia*, 519 F.3d 658, 664 (7th Cir.2008) (Rovner, J., concurring) ("[T]here are indeed references to reliance in the Supreme Court's retroactivity precedents. That is not surprising, for reliance always looms in the background as a reason explaining the Court's longstanding presumption that when Congress enacts a new law, it does not intend for the law to apply retroactively unless it makes that intent clear.... But no Supreme Court decision requires or turns on proof that the party contesting ***384** retroactive application of new legislation actually relied to his detriment on prior law in setting his own course of conduct."(internal citations omitted)).

While some courts of appeals have found the Supreme Court doctrine to be clear on this matter, other courts have disagreed as to whether

detrimental reliance should be a requirement at all, and if so, whether subjective, individualized reliance must be shown as opposed to merely objective reliance. The Third and Fourth Circuits, for example, have stated that no showing of reliance is required. *See, e.g.,* *Atkinson*, 479 F.3d at 231 ("[W]e conclude that reliance is but one consideration in assessing whether a statute attaches new legal consequences to past events."); *Olatunji*, 387 F.3d at 388 ("[W]e hold that reliance (whether subjective or objective) is not a requirement of impermissible retroactivity....").

In rejecting a reliance requirement, the Fourth Circuit in *Olatunji* focused on the presumption against retroactivity set forth in *Landgraf*, reasoning, "we do not believe that subjective reliance is, or ought to be, relevant to the question of whether a particular statute is impermissibly retroactive, as such is neither dictated by Supreme Court precedent nor related to the presumption of congressional intent underlying the bar against retroactivity." 387 F.3d at 389. The court further reasoned:

> Whether the particular petitioner did or did not subjectively rely upon the prior statute or scheme has nothing whatever to do with Congress' intent-the very basis for the presumption against statutory retroactivity. It is one thing to indulge in the supportable presumption that Congress intends its enactments

> not to operate retroactively; it is another altogether to indulge the quite different, and unsupported and unsupportable, presumption that Congress so intends, but only where the particular petitioning party can prove that he subjectively relied on the prior statute to his detriment. In other words, where Congress has apparently given no thought to the question of retroactivity whatever, there is no basis for inferring that Congress' intent was any more nuanced than that statutes should not be held to apply retroactively. Anything more, in the face of complete congressional silence, is nothing but judicial legislation.

Id. at 394. Accordingly, relying on case law from the Third Circuit, the court concluded, "[w]hether a plaintiff did or did not rely on a prior statutory scheme is irrelevant to whether that scheme in fact has a retroactive effect on that plaintiff. 'It is,' as the Third Circuit has noted, 'a strange "presumption" ... that arises only on so heightened a showing as actual reliance.' " *Id.* at 391 (quoting *Ponnapula v. Ashcroft*, 373 F.3d 480, 491 (3d Cir.2004)). Similarly, the Third Circuit in *Atkinson* relied on Supreme Court precedent and the presumption against retroactivity in concluding that no showing of reliance is required. *See* 479 F.3d at 231.

The Sixth, Ninth, and Tenth Circuits, in contrast, have stated that a showing of reliance is required, but these circuits only require a showing of objectively reasonable reliance. *See, e.g.,* *Thaqi v. Jenifer*, 377 F.3d 500, 504 n. 2 (6th Cir.2004) ("We note that, under *St. Cyr*, the petitioner need not demonstrate actual reliance upon the immigration laws in order to demonstrate an impermissible retroactive effect; he need only be among a class of aliens whose guilty pleas 'were likely facilitated' by their continued eligibility for § 212(c) relief."); *Camins v. Gonzales*, 500 F.3d 872, 884 (9th Cir.2007) ("In determining whether the attachment of new legal consequences to past actions conflicts with familiar considerations of fair notice, reasonable*385 reliance, and settled expectations, we require that reliance on the prior law would have been objectively reasonable under the party's circumstances."(citations and internal quotation marks omitted)); *Hem*, 458 F.3d at 1187 ("[W]e conclude that an objective showing of reliance is the appropriate rule.").

The Tenth Circuit's decision in *Hem* extensively sets forth the reasoning for requiring a petitioner to show objective reliance-as opposed to the individualized or actual detrimental reliance required in this Circuit. *Compare* 458 F.3d at 1197, *with* *Wilson*, 471 F.3d at 122. As set forth above, and similar to the Third and Fourth Circuits, the court in *Hem* reasoned that the Supreme Court has never required a showing of actual reliance. *See* *Hem*, 458 F.3d at 1197 ("[I]n

none of the recent retroactivity cases ... did the Supreme Court confer dispositive weight upon the petitioner's actual strategic decisions. And, although *St. Cyr* gives reliance a central role in its retroactivity analysis, the Court there conspicuously applies its holding to all petitioners who took guilty pleas before the effective date of IIRIRA-irrespective of any showing that St. Cyr himself actually relied on the availability of § 212(c) relief."). Further, relying on reasoning set forth by the Third Circuit in *Ponnapula*, 373 F.3d at 489-90, the court in *Hem* explicitly rejected our reasoning in *Rankine*, as follows:

> First, with the exception of a single passing reference to another case, *Rankine* never once mentions the presumption against retroactivity. As the Court made clear in *Landgraf* and its progeny, however, this presumption informs every step of the *Landgraf* inquiry. Second, the particular strategic decisions of the individual petitioners are given dispositive weight in the retroactivity analysis, not whether they, as a class, faced new legal consequences to their completed conduct. Finally, *Rankine* appears to turn the presumption against retroactivity on its head by demanding that petitioners point to conduct on their part that reflects an intention to preserve their eligibility for relief under § 212(c) by going to trial.

458 F.3d at 1196 (alterations, citations, and internal quotation marks omitted). Accordingly, the court in *Hem* "confident[ly]" followed "the objective reliance approach to retroactivity ... in determining whether the repeal of § 212(c) has retroactive effects." *Id.* at 1199.

On the other side of this split, along with our Circuit, the First, Fifth, and Seventh Circuits require that petitioners show individualized, subjective detrimental reliance. *See, e.g., Dias v. INS*, 311 F.3d 456, 458 (1st Cir.2002) (holding that IIRIRA's repeal of § 212(c) was not impermissibly retroactive with respect to petitioners who did not rely on pre-IIRIRA law because the "retroactivity analysis must include an examination of reliance") (citing *Mattis v. Reno*, 212 F.3d 31, 38 (1st Cir.2000) (A petitioner must have "actually and reasonably relied" on the availability of relief for IIRIRA's repeal of § 212(c) to have retroactive effect.), *abrogated on other grounds by St. Cyr*, 533 U.S. at 325-26, 121 S.Ct. 2271),*cert. denied*, 539 U.S. 926, 123 S.Ct. 2574, 156 L.Ed.2d 603 (2003); *Carranza-De Salinas v. Gonzales*, 477 F.3d 200, 205 (5th Cir.2007) ("[T]his circuit requires an applicant who alleges continued eligibility for § 212(c) relief to demonstrate actual, subjective reliance on the pre-IIRIRA state of the law to be eligible for relief from its retroactive application."); *De Horta Garcia*, 519 F.3d at 661 ("[W]e require[ ] a showing of specific facts demonstrating actual reliance."); *see also Brooks v. Ashcroft*, 283 F.3d 1268, 1274 (11th Cir.2002) (finding meritless

petitioner's Equal Protection claim, because, unlike aliens who *386 plead guilty prior to the enactment of IIRIRA, petitioner, who was convicted at trial, "did not so choose to rely upon the agreed upon terms of a plea" and because his case did not present "the same concerns of *quid pro quo,* benefit for an exchange, between a defendant and the government").

Even within these Circuits, however, individual judges have expressed disagreement with the actual reliance requirement. For example, in *Thom,* Judge Calabresi noted that were he "judging on a clean slate, [he] would read the Supreme Court's seminal decision on civil retroactivity, *Landgraf* [ ] - at a minimum - to say that, where Congress has not made its intent clear, courts should presume that any civil statute that would be considered *ex post facto* in the criminal context was meant to apply prospectively only." 369 F.3d at 163 n. 6. Judge Calabresi explained that "[t]his reading would be particularly appropriate in cases where, as here, the civil law in question imposes consequences very like those of criminal penalties," and that he "would expect that the Supreme Court's future decisions in this field will confirm such readings of *Landgraf.*" *Id.* Likewise, in his dissenting opinion in *Thom,* Judge Underhill argued that "[a]lthough there is no denying that considerations of reliance are often illuminating in making retroactivity determinations (indeed, the *presence* of reliance may very well provide the most compelling indication of unfair retroactivity), 'detrimental

reliance' is not the *sine qua non* of retroactivity analysis.... The existence of reliance supported the holding in *St. Cyr*, but the holding in *St. Cyr* does not require the existence of reliance." *Id.* at 167-73. Similarly, in a concurring opinion in *De Horta Garcia*, 519 F.3d at 664-65, Judge Rovner of the Seventh Circuit stated, "the Fourth Circuit's opinion in *Olatunji*... makes a compelling case for the proposition that reliance is not properly an element of the retroactivity inquiry." Judge Rovner further opined that "[t]o the extent that reliance ought to play any role in the retroactivity analysis, it is objective rather than subjective reliance that should be considered," and she concluded that "the precedents that stand in De Horta Garcia's path may be incorrect and should be re-visited." *Id.* at 666. District judges within our Circuit have also expressed their disagreement with the reliance requirement. *See, e.g.*, *Beharry*, 183 F.Supp.2d at 591 (Weinstein, J.) ("*Domond*... should be reconsidered as the courts interpret and develop the Supreme Court's more recent immigration rulings and the requirements of international law."); *Mohammed v. Reno*, 205 F.Supp.2d 39, 47 (E.D.N.Y.) (Gleeson, J.) ("Implicit in [*Domond*'s] conclusion is the premise that an impermissible retroactive effect under *Landgraf* occurs only where a person has knowledge of the law at the time of his actions and actually relies on it. *Landgraf* simply does not support-indeed, it would undermine-that rationale."), *stay pending appeal vacated*, 309 F.3d 95, 103 (2d Cir.2002) (recognizing "the possibility that the Supreme Court might interpret its *St. Cyr*

opinion more expansively than we have").

IV.

As the above illustrates, whether-and to what extent-a showing of reliance on the prior law is required to demonstrate impermissible retroactive effect of a new law is the subject of much debate and, perhaps, "should be re-visited" or reviewed. *See* *De Horta Garcia*, 519 F.3d at 666 (Rovner, J., concurring). Nevertheless, for the moment, an individualized showing of actual reliance is required in our Circuit, and this, Zuluaga is unable to demonstrate. Accordingly, while I disagree with the majority that application of the stop-time rule imposes no new legal consequences*387 on Zuluaga's past conduct, I must concur in the judgment.

APPENDIX C—DECISION OF THE BOARD OF IMMIGRATION APPEALS DECIDED NOVEMBER 5, 2003

- U.S. Department of Justice
Executive Office for Immigration Review
Board of Immigration Appeals

IN RE: LEONARDO MARTINEZ ZULUAGA

File: A90 572 172 - Batavia

November 5, 2003

IN REMOVAL PROCEEDINGS
APPEAL

ON BEHALF OF RESPONDENT:
Eric W. Schultz, Esquire
ON BEHALF OF DHS:

Carol G. Bridge
Assistant District Counsel

CHARGE:
Notice: Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] - Convicted of controlled substance violation

Lodged: Sec. 237(a)(2)(A)(iii), I&N Act [8 U.S.C. § 1227(a)(2)(A)(iii)] - Convicted of aggravated felony

APPLICATION: Cancellation of removal

Appendix C

The record before us has a lengthy procedural history, but what is currently on appeal are two decisions of an Immigration Judge, dated April 8, 2002 and May 7, 2002. The second of these Immigration Judge decisions is a denial of a motion to reconsider the first decision, as such the appeal from this decision is subsumed within the discussion below concerning the respondent's application for relief denied in the April 8, 2002 decision. We agree with the Immigration Judge's conclusions that the respondent is deportable for his controlled substance violation and that he has failed to demonstrate his statutory eligibility for the requested relief. The respondent's appeals will be dismissed.

The respondent appeals from the Immigration Judge's denial of his application for cancellation of removal under section 240A(a) of the Immigration and Nationality Act, 8 U.S.C. § 1229a(a). This form of relief provides that the Attorney General may cancel the removal of an alien who is inadmissible or deportable if the alien:

> (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,
> (2) has resided in the United States continuously for 7 years after having been admitted in any status, and
> (3) has not been convicted of any aggravated felony.

Id.

The respondent was lawfully admitted for permanent residence on December 1, 1990, and does not have a final order of removal. Therefore, he has the requisite 5 years under section 240A(a)(1). *See* Matter of Ayala, 22 I&N Dec. 398 (BIA 1998). Further, his conviction for an aggravated felony has been vacated. The Immigration Judge, however, determined that the respondent had failed to demonstrate the requisite 7 years of continuous residence after having been admitted in any status. As discussed below, the respondent committed a crime on April 9, 1995, and this crime ended his continuous residence for this purpose. *See* Matter of Perez, 22 I&N Dec. 689 (BIA 1999). When this period began, however, was the subject of much of the hearing before the Immigration Judge. Obviously, to have obtained the requisite 7 years of continuous residence after admission, this admission must have occurred by April 9, 1988.

We affirm and adopt the Immigration Judge's conclusion that the respondent has failed to meet his burden of demonstrating the requisite 7 years of residence. *See* Matter of Burbano, 20 I&N Dec. 872, 874 (BIA 1994). The respondent applied for legalization in 1988 and his admission is considered to have occurred on the date his application was filed. *See Matter of Perez, supra.* To have acquired the requisite 7 years, therefore, before April 9, 1995, the exact date he filed his application becomes the determinative, factor in this case.

Citing *Yang v. McElroy*, 277 F.3d 158 (2d Cir. 2002), the respondent argues that the Department of Homeland Security (the "DHS," formerly the Immigration and Naturalization Service) has the burden of production and is required to produce evidence of the timing of the respondent's application. We agree with the Immigration Judge that the DHS has met their burden. They have produced the respondent's complete application and a great many other documents indicating that the earliest he may have filed his application was April 29, 1988 or May 4, 1988. The DHS also presented two immigration officers who testified to the procedures followed in the processing of the applications. While they were unable to produce the officer who actually processed the respondent's application, or anyone who was working in the exact office at the time, we cannot find that they are required to do so. The DHS has produced all of the evidence they have on the respondent's application for legalization, and the respondent has been unable to produce any evidence of his claimed earlier filing date. In fact, he testified that he could not remember when he filed his application (Tr. at 60-64, 69). Considering the large amount of evidence supporting a late April or early May filing and that the ultimate burden in this case is upon the respondent, we must agree with the Immigration Judge that respondent has failed to demonstrate his eligibility for the requested relief. We also note that although the respondent argues that the admission of the

forensic report concerning the date stamped on the original application was unfair (Exh. RR-7), he was provided an opportunity to obtain his own report to rebut this evidence, but declined to do so (Tr. at 128, 135). While not clear, a simple reading of the date on the application appears to show that it was stamped twice, and the date of April 29, 1988, becomes evident when the enlargement in the forensic report is reviewed (Exhs. RR-4 and RR-7). There is no reason to doubt that the enlargement in the report is anything other than what it is purported to be. In any event, the lack of clarity on the date stamp does not shift the burden of proof in this case to the DHS.

While we find that the respondent's period of continuous residence began no earlier than April 29, 1988, the respondent also claims that his period of residence did not end with the commission of his crime on April 9, 1995, but rather continued until he was served with his Notice to Appear. Termination of residence occurs when:

> the alien is served a notice to appear under section 239(a) or (B) when the alien has committed an offense referred to in section 212(a)(2) that renders the alien inadmissible to the United States under section 212(a)(2) or removable from the United States under section 237(a)(2) or 237(a)(4) ...

Section 240A(d)(1) of the Act.

The respondent argues that although his crime might bring him within the purview of this so

called "stop-time" rule, under recent case law, such an application of this law is impermissibly retroactive. *See Henry v. Ashcroft*, 175 F. Supp. 2d 688 (S.D.N.Y. 2001). As noted by the Immigration Judge, however, the Immigration Judge and this Board are not bound to follow the published decision of a United States district court even in cases arising within the same district. *Matter of K-S-*, 20 I&N Dec. 715 (BIA 1993). As we held in *Matter of Perez, supra,* the "stop-time" rule applies in situations like the one before us, and the respondent has not demonstrated the requisite 7 years of residence. Also, the district court in *Henry v. Ashcroft, supra,* noted that the respondent in that case was eligible for relief at the time of her crime inferring that she could have, perhaps, relied on that knowledge in taking her various actions. Here, it does not appear that the respondent was eligible for any relief available at the time of his crime. *See* former section 212(c) of the Act, 8 U.S.C. § 1182(c)(requiring 7 years of unrelinquished lawful domicile) and former section 244(a)(2) of the Act, 8 U.S.C. § 1254(a)(2)(requiring 10 years of physical presence and good moral character). *See also INS v. St. Cyr*, 121 S.Ct. 2271 (U.S. 2001).

Based on the foregoing, the following order will be entered.

ORDER: The appeals are dismissed.

s/

FOR THE BOARD

APPENDIX D—ORDER OF IMMIGRATION JUDGE DENYING MOTION TO RECONSIDER ISSUED ON MAY 7, 2002

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
4250 FEDERAL DRIVE
BATAVIA, NY 14020

IN THE MATTER OF	**IN REMOVAL PROCEEDINGS**
LEONARDO MARTINEZ-ZULUAGA	A#90-572-172
ON BEHALF OF INS	**ON BEHALF OF THE RESPONDENT**
Carol G. Bridge, Esq. Assistant District Counsel 4250 Federal Drive Batavia, NY 14020	Robert D. Kolken, Esq. SACKS & KOLKEN Suite 1320 · Statler Towers 107 Delaware Avenue Buffalo, NY 14202-2993

Appendix D

ORDER ON MOTION TO RECONSIDER

UPON READING AND CONSIDERING the Respondent's Motion to Reconsider the Court's decision dated April 8, 2002 in the subject removal proceeding; and

UPON READING the INS's response in opposition thereto; and

The Court having duly considered the matter and being otherwise fully advised of the premises and all the proceedings had heretofore;

IT IS ORDERED that the Respondent's Motion to Reconsider is hereby **DENIED**. The attorney for the Respondent suggests that this Court adhere to the holding in Henry v. Ashcroft, 175 F.Supp. 2d 688 (SDNY 2001) to the effect that the "clock stopping" provision of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 has an impermissible retroactive effect. This Court is not bound by any holdings in the District Court for the Southern District of New York.

This Court is bound, however, by the precedent decisions of the Board of Immigration Appeals. The BIA has specifically dealt with this determination in Matter of Perez, Int.Dec. 3389 (BIA 1999) and has held that an offense described in §240A(d)(1) is deemed to end continuance residence or physical presence for cancellation of

removal purposes as of the date of its commission, even if the offense was committed prior to the enactment of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996.

DONE and ORDERED this 7th day of May, 2002 at Batavia, New York.

s/ John B. Reid
John B. Reid
Immigration Judge

APPENDIX E—ORDER OF THE BOARD OF IMMIGRATION APPEALS REMANDING THE CASE TO THE IMMIGRATION JUDGE ISSUED APRIL 8, 2002

In the Matter of

LEONARDO MARTINEZ-ZULUAGA,	)	IN
	)	REMOVAL
Respondent	)	PROCEEDINGS

CHARGE: Previously set forth.

APPLICATION: Cancellation of removal, pursuant to Section 240(A)(a) of the Immigration and Nationality Act (the Act).

ON BEHALF OF RESPONDENT:	ON BEHALF OF SERVICE:
Robert D. Kolken, Esquire Sachs & Kolken Statler Towers 107 Delaware Avenue Suite 1320 Buffalo, NY 14202	Carol G. Bridge, Esquire Assistant District Counsel Batavia, New York

Appendix E

U.S. Department of Justice
Immigration Appeals
Executive Office for Immigration Review

Falls Church, Virginia 22041

Decision of the Board of

Date: SEP 06 2001

File: A90 572 172 — Batavia, New York

In re: LEONARDO MARTINEZ-ZULUAGA,
a.k.a. Leonardo Zuluaga

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF SERVICE: Steven J. Connelly
Assistant District
Counsel

CHARGE:

Notice: Sec. 237(a)(2)(B)(i), I&N Act
[8 U.S.C. § 1227(a)(2)(B)(i)] -
Convicted of controlled substance
violation

Appendix E

PER CURIAM. In a decision and order dated July 17, 2001, the United States District Court for the Western District of New York granted the Immigration and Naturalization Service motion to remand on the basis of newly discovered evidence, vacated the removal order in the case, and remanded to the case to the Board. The court ordered that the matter be further remanded to the Immigration Judge, to "determine the factual issue of when the petitioner originally was admitted to the United States." As previously recognized by the Immigration Judge, this respondent's eligibility to pursue an application for cancellation of removal is dependent on whether he has resided in the United States continuously for seven years after having been admitted in any status. Accordingly, the record is remanded to the Immigration Judge for further proceedings consistent with the court's decision and order.

s/ D.B. (illegible)
FOR THE BOARD

APPENDIX F—ORDER OF BOARD OF IMMIGRATION APPEALS AFFIRMING DECISION OF IMMIGRATION JUDGE ISSUED NOVEMBER 22, 2000

U S. Department of Justice Decision of the
Board of Immigration Appeals
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A90-572-172 – Buffalo Date: NOV 22 2000

In re: MARTINEZ-ZULUAGA, LEONARDO

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro se

ON BEHALF OF SERVICE: Connelly, Steven J.

ORDER:

PER CURIAM. The Board affirms, without opinion, the results of the decision below. The decision below is, therefore, the final agency determination. *See* 8 C.F.R. § 3.1(a)(7).

s/ Paul Wickham Schmidt
FOR THE BOARD

APPENDIX G—ORAL DECISION OF IMMIGRATION JUDGE DECIDED JUNE 22, 2000

U.S. DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Buffalo, New York

File No.: A 90 572 172	June 22, 2000
In the Matter of	
LEONARDO MARTINEZ-ZULUAGA, Respondent	IN REMOVAL PROCEEDINGS
CHARGE:	Previously set forth.
APPLICATION:	Cancellation of removal, pursuant to Section 240(A)(a)of the Immigration and Nationality Act (the Act).

ON BEHALF OF RESPONDENT:	ON BEHALF OF SERVICE:
Pro se	Stephen J. Connelly, Esquire Assistant District Counsel, Patavia, New York

ORAL DECISION OF THE
IMMIGRATION JUDGE

This Court found the respondent removable from the United States, as set forth in the charging documents herein, by way of oral decision dated May 25, 1999. The Court specifically found that the respondent was removable for having been convicted of one or more drug convictions under Section 237(a)(2)(B)(I) of the Act and as an aggravated felon under Section 237(a)(2)(A)(iii) of the Act, for having been convicted of aggravated felonies as set forth in Section 101(a)(43)(F) of the Act, being crimes of violence. This Court found the respondent statutorily ineligible for any form of relief and ordered his removal from the United States to the country of Columbia.

The respondent appealed my decision to the Board of Immigration Appeals and the Board of Immigration Appeals dismissed the respondent's appeal by order dated November 3, 1999. Subsequent to that date, however, the, respondent submitted evidence to the Board of Immigration

Appeals to show that his convictions for assault and battery had been vacated by the court in Massachusetts. The Board therefore, by order dated May 2, 2000 (Exhibit Number R-1 in these proceedings), reopened these proceedings and remanded them to the Court for further proceedings.

Upon rescheduling of these proceedings before the Court, the respondent was initially represented by Hichem Kefi of the International Institute. Mr. Kefi is an accredited representative. On May 17th, of this year, however, the respondent indicated that he no longer wanted the assistance of Mr. Kefi and Mr. Kefi was allowed to withdraw as counsel.

This Court explained to the respondent and to Mr. Kefi, the concerns that it had that the respondent might be statutorily ineligible for cancellation of removal under the stop time provisions of Section 240A(d)(1). These proceedings were subsequently adjourned to June 1, June 8, and to today's date to give the respondent an opportunity to obtain counsel. The respondent has still not been able to obtain counsel.

On today's date, I went forward. The respondent believes he is statutorily eligible for cancellation of removal and this Court believes that he is not statutorily eligible. The respondent's initially entered the United States without being inspected and admitted or paroled into the United States by an Immigration Officer. Subsequently, the respondent obtained permanent residence based upon an application that was approved for

temporary residence and the grant of permanent residence. As admitted by the respondent, and as evidenced by the documentation herein, especially Exhibit Number R-4, the respondent filed his application for temporary residence on May 4, 1988. This is the first date that the respondent can be considered to have been admitted to the United States lawfully. This is relevant under Section 240(A)(a)(2) which states that the respondent "has resided in the United States continuously for seven years after having been admitted in any status,"

As set forth above, the respondent's convictions for assault and battery, which form the bases of his aggravated felony, crime of violence charge, have been vacated. Therefore, the respondent is not removable from the United States on that charge. As admitted by the respondent, however, the respondent's drug convictions have not been vacated. The respondent admitted his conviction as set forth in Allegation 6 of Exhibit Number 1-A that he was convicted on May 1, 1998 in the Framingham District Court, Framingham, Massachusetts for illegal possession of heroin. The conviction record relating to that conviction is part of Group Exhibit Number 2. That conviction record clearly shows that the date of the drug offense is April 9, 1995. It must be noted that April 9, 1995 is less than seven years after May 4, 1988.

Section 240(A)(d) deals with special rules relating to continuous residence or physical presence. It states "(1) Termination of Continuous Period - for purposes of this Section, any period of continuous residence or continuous physical

presence in the United States will be deemed to end when the alien is served a Notice to Appear under Section 239(a) or when the alien has committed an offense referred to in Section 212(a)(2) that renders the alien inadmissible to the United States under Section 212(a)(2) or removable from the United States under Section 237(a)(2) or 237(a)(4), which ever is earliest."

The respondent's May 1, 1998 conviction for criminal possession of heroin is for a conviction referred to in Section 212(a)(2)of the Act and it renders him removable from the United States as found by this Court, under Section 237(a)(2)(B)(I) of the Act. Therefore, the stop time provisions of Section 240(A)(d)(1) apply to the respondent. The commission of the offense relating to the drug conviction was April 9, 1995, less than seven years from the respondent's initially establishing residence in the United States after having "been admitted in any status" that admission being his application for temporary residence.

Therefore, based upon the foregoing, I find that the respondent is statutorily ineligible for cancellation of removal pursuant to Section 240(A)(a)(2) of the Act. I therefore, pretermit the respondent's application for cancellation of removal.

The respondent's drug conviction will also make the respondent statutorily ineligible even for voluntary departure under Section 240B of the Act because the respondent is unable to show good moral character under Section 101 of the Act.

Based upon the foregoing, the following order of the Court shall enter:

ORDERS

ORDERED the respondent's application for cancellation of removal is hereby pretermitted and denied;

FURTHER ORDERED the respondent is hereby ordered removed from the United States to Columbia on the charge of Section 237(a) (2) (B) (I) of the Act.

/s/ John B. Reid
JOHN B. REID
Immigration Judge

APPENDIX H—ORDER OF BOARD OF IMMIGRATION APPEALS GRANTING MOTION TO REOPEN ISSUED MAY 2, 2000

U.S. Department of Justice
Executive Office for Immigration Review

Decision of Board of Immigration Appeals

Falls Church, Virginia 22041

File: A90 572 172 - Batavia Date: MAY 2 2000

In re: LEONARDO MARTINEZ-ZULUAGA a.k.a. Leonardo Zuluaga

IN REMOVAL PROCEEDINGS

MOTION

ON BEHALF OF RESPONDENT: Hichem Kefi, Accredited Representative

ON BEHALF OF SERVICE: Carla J. Hengerer Assistant District Counsel

CHARGE:

Appendix H

Notice: Sec. 237(a)(2)(B)(i), I&N Act [8 U.S.C. § 1227(a)(2)(B)(i)] – Convicted of controlled substance violation

APPLICATION: Motion to reopen

ORDER:

PER CURIAM: This case was last before us on November 3, 1999, when we dismissed the respondent's appeal of the Immigration Judge's decision. On December 21, 1999, the Board received a Motion to Reopen and Request for Stay of Deportation from the respondent. In the motion, the respondent requests that the proceedings be reopened in order to apply for cancellation of removal pursuant to section 240A of the Immigration and Nationality Act, 8 U.S.C. § 1229b. In support of the motion, the respondent provided a copy of a court order which vacates certain listed convictions. The court order proffered by the respondent, dated October 28, 1999, indicates that his convictions under No. 95CR 02944A, 95CR 02956A, and 95CR 0110D are vacated pursuant to Mass. Gen. Laws ch. 278, § 29D. The Immigration and Naturalization Service does not oppose the respondent's motion to reopen for the purpose of pursuing an application for cancellation of removal. In light of the Service's position in this matter we grant the motion. Accordingly, the proceedings are

reopened and the record is remanded to the Immigration Court for further proceedings.

S/ Neil P. (illegible)
FOR THE BOARD

APPENDIX I—DECISION OF THE BOARD OF IMMIGRATION APPEALS DECIDED NOVEMBER 3, 1999

U.S. Department of Justice
Decision of the Board of Immigration Appeals
Executive Office for Immigration Review

Falls Church, Virginia 22041

File: A90 572 172 – Batavia Date: Nov 3 1999

In re: LEONARDO MARTINEZ-ZULUAGA
a.k.a. Leonardo Zuluaga

IN REMOVAL PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Pro Se

ON BEHALF OF SERVICE: Carla J. Hengerer
Assistant District
Counsel

CHARGE:

Notice: Sec. 237(a)(2)(B)(i), I&N Act
[8 U.S.C. § 1227(a)(2)(B)(i)]
Convicted of controlled substance
violation

Appendix I

Lodged: Sec. 237(a)(2)(A)(iii), I&N Act
[8 U.S.C. § 1227(a)(2)(A)(iii)]
Convicted of aggravated felony

APPLICATION: Cancellation of removal under section 420A(a)

In a decision dated May 25, 1999, the Immigration Judge found the respondent removable as charged and denied his applications for relief. The respondent has appealed. The appeal will be dismissed.

The respondent is a native and citizen of Colombia. He became a lawful permanent resident on December 1, 1990. The record reflects that the respondent was convicted in Massachusetts, on May 1, 1998, of 3 counts of assault and battery and sentenced to 18 months of incarceration on each count. The respondent was also convicted twice, in 1998 and 1999, of possession of heroin (Tr. at 26-28; Exh. 1). We agree with the Immigration Judge that the assault convictions cannot be collaterally attacked, and are therefore final for immigration purposes. See Matter of Khalik, 17 I&N Dec. 518 (BIA 1980).

We also agree with the Immigration Judge that the respondent was convicted of an aggravated felony under section 101(a)(43)(F) of the Act, 8 U.S.C. § 1101(a)(43)(F), based on the assault convictions. An alien convicted of an aggravated felony is not eligible for cancellation of removal.

Sections 240A(a)(3) of the Act, 8 U.S.C. § 1229b(a)(3).

A waiver of inadmissibility under section 212(c) of the Act is not a form of relief that is available in removal proceedings. See section 304(b) of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996, Pub. L. No. 104-208, 110 Stat. 3009 ("IIRIRA"). Therefore, because the respondent is in removal proceedings, he is not eligible for section 212(c) relief.

In regard to the respondent's constitutional claims regarding the unavailability of section 212(c) relief, we note that we have no jurisdiction to rule on the constitutionality of laws enacted by Congress. Matter of Fuentes-Campos, Interim Decision 3318 (BIA 1997); Matter of C-, 20 I&N Dec. 529 (BIA 1992).

Accordingly, the respondent's appeal will be dismissed. His country of removal is Colombia.

ORDER: The appeal is dismissed.

s/ Edward R. Gart
(illegible)
FOR THE BOARD

APPENDIX J—ORAL DECISION OF IMMIGRATION JUDGE DECIDED MAY 25, 1999

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
IMMIGRATION COURT
Batavia, New York

File No.: A 90 572 172

In the Matter of	)	
	)	
LEONARDO MARTINEZ-ZULUAGA,	)	IN
	)	REMOVAL
Respondent	)	PROCEEDINGS

CHARGES: Section 237(a)(2)(B)(i) of the Immigration and Nationality Act (The Act) - Convicted of a controlled substance conviction;

Section 237(a)(2)(A)(iii) of the Act - Convicted of an aggravated felony as defined in section 101(a)(43)(F) of the Act - Crime of violence.

APPLICATION: None.

ON BEHALF OF RESPONDENT:

ON BEHALF OF SERVICE:

Pro Se

Carla Hengerer, Esq.
Asst. Dist. Counsel

ORAL DECISION OF THE
IMMIGRATION JUDGE

May 25, 1999

The respondent is a 36-year-old, single male, native and citizen of Colombia. He entered the United States apparently in 1985 and had his status adjusted through section 210 of the Immigration and Nationality Act, relating to special agricultural workers, to that of a temporary resident on May 4, 1988 and, by operation of law, to a permanent resident as of December 1, 1990.

The respondent is charged with being removable from the United States, on the charges set forth above, in a Notice to Appear dated June 25, 1998 (Exhibit number 1) as supplemented by a form I-261, additional charges of inadmissibility/ deportability dated April 14, 1999 (Exhibit number 1-A), and a form I-261 dated May 5, 1999 (Exhibit number 1-B).

The respondent first appeared before the Court on April 1, 1999 when the charges against him were explained, the respondent was given a list of free legal services, and advised of his right to an attorney. The matter was then adjourned to April 15, 1999 to allow the respondent an opportunity to obtain an attorney. On April 15, 1999, the matter was again adjourned to April 29,

1999 to allow the respondent and opportunity to deal with the additional charges against him and to get an attorney. The matter was subsequently adjourned again to May 11, 1999 to allow the respondent to get an attorney and to May 25, 1999, today's date, to give the respondent additional time to get an attorney and again to deal with new charges by the Government.

The respondent has been before this Court for almost two months. Although he has indicated that his family was attempting to get him an attorney, there has been no attorney who has appeared on his behalf. The Court required that the respondent go forward today and enter pleadings in this matter.

After being advised of his rights, the respondent admitted all of the allegations contained on the charging documents. Specifically, the respondent admitted two drug convictions as set forth in allegation six on Exhibit number 1-A and allegation seven on Exhibit 1-B. The respondent also admitted convictions on May 1, 1998 on three separate counts of assault and battery with a sentence of imprisonment of 18 months on each count.

The respondent offered to the Court a two-page typed letter which has been marked into the record as Exhibit number 3. This letter basically indicates that the respondent was not guilty on the assault and battery charges. The respondent did, however, plead guilty to those charges, and they are at this point final convictions. I have attempted to explain to the respondent that this

Court cannot look behind the convictions and must accept them as final unless and until they are vacated. The respondent admitted that he was charged with 18 months in prison but indicated that he only served six months.

The Government introduced into evidence, without objection, documentation contained in Group Exhibit number 2. This documentation, among other things, consists of the criminal records relating to the respondent's charged convictions.

Based upon the respondent's admissions, and my review of the documents contained in Group Exhibit number 2, I find that the respondent is removable, as charged on all three charges, by evidence which is clear and convincing.

Although the respondent has suffered two heroin convictions, the Government indicates that they do not believe the respondent is an aggravated felon for drugs based upon the fact that the first conviction had not been completed at the time the second act was committed. Clearly, however, the respondent is removable for having been convicted of a drug offense.

The respondent has suffered three convictions for assault and battery under Massachusetts law. He has been sentenced to a term of imprisonment of 18 months for each of these convictions, although only six months to serve. Clearly any one of those three convictions would make the respondent an aggravated felon for a crime of violence under section 101(a)(43)(F) of the Act. Each of these are clearly crimes of violence. Although the respondent only had to

serve six months of the 18-month term set forth by the court, section 101(a)(48)(B) states "any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any suspension of the imposition or execution of that imprisonment or sentence in whole or in part." The respondent's sentence was 18 months, and he is an aggravated felon.

Because the respondent has been convicted of three aggravated felonies, he is statutorily ineligible for any form of relief from removal. The respondent has designated Colombia as the country for removal.

Based upon the foregoing, the following order of the Court shall enter:

I. ORDER

The respondent be and he hereby is removed from the United States to Colombia on all three charges contained in the respective charging documents.

s/ John B. Reid
JOHN B. REID
Immigration Judge

APPENDIX K—UNPUBLISHED DECISION OF THE WESTERN DISTRICT OF MICHIGAN, DECIDED FEBRUARY 19, 2004

EDUARDO RAUL GENERI, Petitioner, v. JOHN ASHCROFT, et al., Respondents.

Case No. 4:03-CV-15

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION

2004 U.S. Dist. LEXIS 6396

February 19, 2004, Decided

SUBSEQUENT HISTORY: Approved by, Adopted by, Writ of habeas corpus granted *Generi v. Ashcroft, 2004 U.S. Dist. LEXIS 6387 (W.D. Mich., Apr. 12, 2004)*

DISPOSITION: [*1] Magistrate recommended that Petitioner's petition for writ of habeas corpus be granted and that he be permitted to apply for a waiver of deportation.

CASE SUMMARY:

PROCEDURAL POSTURE: An immigration judge concluded that as a result of petitioner alien's 1974

conviction for attempted breaking and entering, he failed to establish seven years of continuous residence in the United States as required by *8 U.S.C.S. § 1229b(a)*, and thus he did not qualify to apply for a waiver of deportation. The alien filed a petition for writ of habeas corpus under *28 U.S.C.S. § 2241*. The case was before a magistrate judge.

OVERVIEW: The issue raised by the alien's habeas petition related to the application of the clock-stopping provision, *8 U.S.C.S. § 1229b(d)(1)* of the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA), Pub. L. No. 104-208, 110 Stat. 3009. The alien asserted that it violated federal law to apply a provision enacted in 1996 to conduct which occurred in 1974. The court found that while Congress had expressly stated that the clock-stopping provision was to be retroactively applied as to orders to show cause issued prior to the enactment of the IIRIRA, Congress had made no such affirmative declaration that the clock-stopping was to be applied to crimes committed prior to the enactment of the IIRIRA. The alien's right to discretionary relief was a substantive right, and it was the retroactive denial of an already accrued eligibility for discretionary relief that gave the clock stopping provision its impermissible retroactive effect. Thus, retroactive application of the clock-stopping provision as to the alien violated clearly established federal law as articulated by the United States Supreme Court.

OUTCOME: The magistrate recommended that the alien's petition for a writ of habeas corpus be

granted and that he be permitted to apply for a waiver of deportation.

COUNSEL: For Eduardo Raul Generi, petitioner: Jose A. Sandoval, LEAD ATTORNEY, Sandoval Gardiner, P.C., Richard G. Kessler, LEAD ATTORNEY, Law Office of Richard Kessler, P.C., Grand Rapids, MI.

For John Ashcroft, Carol Jenifer, respondents: James Santelle, LEAD ATTORNEY, James Santelle, U.S. Attorney (Grand Rapids), Grand Rapids, MI.

JUDGES: ELLEN S.CARMODY, United States Magistrate Judge. Hon. Richard Alan Enslen.

OPINION BY: ELLEN S.CARMODY

OPINION

REPORT AND RECOMMENDATION

This matter is before the Court on Generi's petition for writ of habeas corpus. In accordance with *28 U.S.C. § 636(b)*, authorizing United States Magistrate Judges to submit proposed findings of fact and recommendations for disposition of prisoner petitions, I recommend that Generi's petition be **granted.**

I. Background

Petitioner, a citizen of Argentina, entered the United States in November 1969, at the age of 15.

Petitioner later married and he presently resides in Michigan with his wife and children. On October 16, 1974, Petitioner pled guilty to [*2] attempted breaking and entering an occupied dwelling with the intent to commit larceny. A fine was imposed and Petitioner was further sentenced to restitution and probation. In August 2001, Petitioner pled guilty to one count of use of cocaine and one count of possession of marijuana, both misdemeanor offenses. Petitioner was again fined and placed on probation. Petitioner's 2001 convictions, however, subjected him to deportation pursuant to *8 U.S.C. § 1227(a)(2)(B)(i)*, which provides that

> Any alien who at any time after admission has been convicted of a violation of ... any law or regulation of a State, the United States, or a foreign country relating to a controlled substance ... is deportable.

Removal proceedings were initiated against Petitioner in June 2001, and pursuant to federal law he was taken into custody. *See 8 U.S.C. § 1226(c)(1)(B)* ("The Attorney General *shall* take into custody any alien who ... is deportable by reason of having committed any offense covered in *section 1227(a)(2)(A)(ii), (A)(iii), (B), (C), or (D)* of this title"). An immigration judge subsequently concluded that Petitioner was subject to [*3] deportation, a determination later affirmed by the Board of Immigration Appeals (BIA). The determination that Petitioner's 2001 convictions

render him deportable is not presently at issue. Instead, the issue presented by Generi's petition relates to his qualification to petition the Attorney General for a waiver of his deportation order.

On September 30, 1996, Congress enacted the Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA). *See Henry v. Ashcroft, 175 F. Supp.2d 688, 690 (S.D.N.Y. 2001).* This Act modified various aspects of federal immigration law, including the eligibility requirements for seeking discretionary relief from deportation, the aspect of immigration law presently at issue.

Prior to the enactment of the IIRIRA, certain lawful permanent residents otherwise determined to be deportable were entitled to apply to the Attorney General for a waiver of deportation. To be eligible for a waiver, however, the applicant had to have lawfully resided in the United States for seven consecutive years. Under the IIRIRA, an alien subject to deportation is still permitted to apply for a waiver of deportation, but the Act articulates different (and [*4] more restrictive) requirements. *Id.* The waiver applicant still must have resided in the United States continuously for seven years. *8 U.S.C. § 1229b(a).* However, the IIRIRA also added a "clock-stopping" provision that had not been part of prior law. This provision provides that:

> For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end ... when the alien has committed an offense referred to in

> *section 1182(a)(2)* of this title that renders the alien inadmissible to the United States under *section 1182(a)(2)* of this title or removable from the United States under *section 1227(a)(2) or 1227(a)(4)* of this title, whichever is earliest.

8 U.S.C. § 1229b(d)(1).

Section 1182(a)(2) provides that "any alien convicted of ... a crime involving moral turpitude ... or an attempt or conspiracy to commit such a crime ... is inadmissible." *8 U.S.C. § 1182(a)(2)(A)(i).* The immigration judge concluded that Petitioner's 1974 offense of attempted breaking and entering an occupied building with the intent to commit larceny constituted [*5] a crime involving moral turpitude, a determination affirmed by the BIA. *See, e.g., Bakal v. Ashcroft, 56 Fed. Appx. 650, 2003 WL 103076 at *3-4 (6th Cir., Jan. 9, 2003)* ("theft is considered a crime of moral turpitude").

The immigration judge concluded that as a result of Petitioner's 1974 conviction for attempted breaking and entering (which pursuant to the clock-stopping provision "ended" his period of continuous residence) he failed to establish seven years of continuous residence in the United States as required by *§ 1229b(a).* Accordingly, the immigration judge concluded that Petitioner did not qualify to apply for a waiver of deportation.

The issue raised by Generi's petition relates to this application of the clock-stopping provision of

the IIRIRA. Petitioner asserts that it violates federal law to apply a provision enacted in 1996 to conduct which occurred in 1974.

II. Applicable Standard

Generi has filed his petition pursuant to *28 U.S.C. § 2241*, which provides that habeas corpus relief may extend to any person "in custody in violation of the Constitution or laws or treaties of the United States." As the United States Supreme Court recently [*6] held, federal district courts have jurisdiction to resolve petitions for writ of habeas corpus filed under *§ 2241* by aliens subject to deportation. *See INS v. St. Cyr, 533 U.S. 289, 314, 150 L. Ed. 2d 347, 121 S. Ct. 2271 (2001); Ford v. Bureau of Immigration and Customs Enforcement's Interim Field Office Director for Detention and Removal for the Philadelphia District, 294 F. Supp.2d 655, 658 (M.D. Pa. 2003).*

However, the Court's review of immigration decisions rendered by administrative agencies is limited. Specifically, the Court's jurisdiction extends only to "purely legal questions." *See Ford, 294 F. Supp.2d at 658-59.* Specifically, the Court must confine its review to "statutory and constitutional claims as well as claims asserting the erroneous application of legal principles to undisputed facts." *Ford, 294 F. Supp.2d at 659; see also, Steinhouse v. Ashcroft, 247 F. Supp.2d 201, 205 (D. Conn. 2003)* (pursuant to *§ 2241*, the court may review only "purely legal claims"). Accordingly, the Court is precluded from reviewing "discretionary determinations" rendered by the

administrative agency. *Ford, 294 F. Supp.2d at 659.* [*7]

III. Petitioner's Claim of Improper Retroactive Application

Petitioner initially claimed that application as to him of the statute at issue violated the *Ex Post Facto Clause.* Petitioner subsequently abandoned this claim, however. Petitioner did not assert this claim in his supplemental pleadings and he expressly abandoned his Ex Post Facto claim at oral argument. This appears to be an appropriate decision, as the *Ex Post Facto Clause* prohibits the retroactive application of *penal* legislation only, *see Landgraf v. USI Film Prods., 511 U.S. 244, 266, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994),* and immigration statutes are properly characterized as civil -- not penal -- measures. *See Domond v. United States INS, 244 F.3d 81, 87 (2d Cir. 2001).* Instead, as detailed below, Petitioner presently asserts that the statute at issue was retroactively applied to him contrary to federal law.

As the Supreme Court has indicated, "retroactive statutes raise special concerns." *INS v. St. Cyr, 533 U.S. 289, 315 (2001).* One of the concerns is that the legislative branch may be "tempted," due to "political pressures, [*8] to "use restrictive legislation as a means of retribution against unpopular groups or individuals." *Id.* Accordingly, congressional enactments "will not be construed to have retroactive effect unless their language requires this result." *Id. at 315-16.*

Despite the various concerns regarding retroactive legislation, "it is beyond dispute that, within constitutional limits, Congress has the power to enact laws with retrospective effect." *Id. at 316.* Nonetheless, a statute may not be applied retroactively unless there exists "a clear indication from Congress that it intended such a result." *Id.*

The Supreme Court has articulated a two-step analysis by which to determine whether a federal statute may properly be applied retroactively. First, it must be determined whether Congress "has expressly prescribed the statute's proper reach." *Martin v. Hadix, 527 U.S. 343, 352, 144 L. Ed. 2d 347, 119 S. Ct. 1998 (1999).* If Congress has sufficiently articulated the temporal reach of the provision at issue, such intent shall prevail, subject to constitutional limitations. *Id.; Landgraf v. USI Film Products, 511 U.S. 244, 266, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994).* [*9]

However, where there exists insufficient evidence of Congressional intent regarding a provision's temporal scope, the Court must determine whether "the application of the statute to the conduct at issue would result in a retroactive effect." *Martin, 527 U.S. at 352.* If such is the case, the "traditional presumption" against retroactive application applies, precluding application of the statute to the conduct at issue. *Id.*

A. Has Congress Expressly Prescribed the Statute's Proper Reach

The standard which Congress must satisfy before it can be said to have provided

"unambiguous direction" regarding the temporal reach of a statute (or portion thereof) is "a demanding one." *St. Cyr, 533 U.S. at 316.* As the Supreme Court recently stated, "Cases where this Court has found truly 'retroactive' effect adequately authorized by statute have involved statutory language that was so clear that it could sustain only one interpretation." *Id. at 316-17.* It must also be remembered that "any lingering ambiguities in deportation statutes" are to be construed "in favor of the alien." *Id. at 320.*

As indicated above, the "clock-stopping" [*10] provision of the IIRIRA provides that:

> For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end (A) except in the case of an alien who applies for cancellation of removal under *subsection (b)(2)* of this section, when the alien is served a notice to appear under *section 1229(a)* of this title, or (B) when the alien has committed an offense referred to in *section 1182(a)(2)* of this title that renders the alien inadmissible to the United States under *section 1182(a)(2)* of this title or removable from the United States under *section 1227(a)(2) or 1227(a)(4)* of this title, whichever is earliest.

8 U.S.C. § 1229b(d)(1).

The immigration judge who presided over this matter interpreted this provision as applying retroactively to Petitioner's 1974 conviction for attempted breaking and entering, thus terminating his period of continuous residence for purposes of seeking relief from deportation. Accordingly, the immigration judge found Petitioner ineligible to apply for a waiver of deportation. The decision of the immigration judge was subsequently upheld by the Board of [*11] Immigration Appeals (BIA).

As indicated above, the clock-stopping provision serves to terminate "any period of continuous residence" in two separate and distinct circumstances. It applies (1) when the alien is served a notice to appear under *section 1229(a)*, or (2) when the alien commits an offense referred to in *section 1182(a)(2)* that renders him deportable under *section 1227(a)(2) or 1227(a)(4)*. The clock-stopping provision contains no language addressing its retroactive applicability as to either of these two triggering events.

In fact, as courts have recognized, "the IIRIRA generally applies only to proceedings initiated on or after the statute's effective date of April 1, 1997." *Rojas-Reyes v. Immigration and Naturalization Service, 235 F.3d 115, 120 (2d Cir. 2000)* (citing IIRIRA § 309(c)(1), 110 Stat. at 3009-546 (codified at *8 U.S.C. § 1101* note)). As part of the IIRIRA, however, Congress enacted a "transitional rule" that provides as follows:

> Transitional Rule With Regard to Suspension of Deportation - Paragraphs

> (1) and (2) of *section 240A(d)*[1] of the Immigration and Nationality Act (relating to continuous residence or physical [*12] presence) shall apply to notices to appear issued before, on, or after the date of enactment of this Act.

See, e.g., Rojas-Reyes, 235 F.3d at 120 (quoting IIRIRA § 309(c)(5), 110 Stat. at 3009-546).

Thus, while the transitional rule, an express exception to the general rule that the IIRIRA is to be applied prospectively only, states that the clock-stopping provision is to apply retroactively as to "notices to appear," it makes no such pronouncement regarding the retroactive application of the clock-stopping provision as to crimes committed prior to the enactment of the IIRIRA (the very circumstance presented by Generi's petition). In other words, the transitional rule expressly addresses itself to one of the two triggering events articulated in the clock-stopping provision, but is completely silent as to the other.

The transitional rule (consistent with the language of the clock-stopping [*13] provision) makes reference to "notices to appear," the document by which deportation proceedings are commenced. This reference caused confusion, however, because prior to the enactment of the IIRIRA deportation proceedings were commenced by service of a charging document called an "order

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1 Section 240A(d) refers to *8 U.S.C. § 1229b(d)*, the clock-stopping provision.

to show cause." *See Rojas-Reyes, 235 F.3d at 120.* It was unclear, in other words, whether the clock-stopping provision applied retroactively as to orders to show cause. *See, e.g., Ashki v. INS, 233 F.3d 913, 917-18 (6th Cir. 2000).*

Congress subsequently resolved any ambiguity in the language employed in the transitional rule. On November 19, 1997, Congress enacted the Nicaraguan Adjustment and Central American Relief Act (NACARA), one purpose of which was to amend the transitional rule. *See* Pub. L. No. 105-100, 111 Stat. 2160. As amended by NACARA, the transitional rule articulated in the IIRIRA provides as follows:

> Paragraphs (1) and (2) of section *240A(d)* of the Immigration and Nationality Act (relating to continuous residence or physical presence) shall apply to *orders to show cause* ... issued before, on, or after [*14] the date of enactment of this Act.

See Ashki, 233 F.3d at 918 (quoting NACARA § 203(a), 111 Stat. at 2160 (emphasis added)).

By amending the IIRIRA transitional rule, through enactment of NACARA, Congress again expressed its considered judgment regarding the extent to which the clock-stopping provision should be given retroactive application. While Congress indicated that the clock-stopping rule should be retroactively applied as to orders to show cause issued prior to the enactment of the IIRIRA,

Congress was again completely silent on the issue of whether the clock-stopping provision should be applied retroactively to crimes committed prior to the enactment of the IIRIRA.

It is important to recognize that Congress enacted the IIRIRA (including its clock-stopping provision and transitional rules), as well as NACARA, against the backdrop of the *Landgraf* Court's instruction to Congress that if it intended for a statute (or portion thereof) to be applied retroactively, it must *clearly* articulate such an intention. Congress, however, has not articulated any intention to retroactively apply the clock-stopping provision to crimes which were committed [*15] prior to the enactment of the IIRIRA. As has been recognized:

> Congress presumably was well aware of the teachings of *Landgraf* - including its admonition that Congress should be explicit when it intended a new law to apply retroactively - when it elected not to include explicit language making the clock stopping provision applicable to crimes committed prior to the effective date of IIRIRA where cancellation proceedings were not commenced until later.

Henry v. Ashcroft, 175 F. Supp.2d 688, 694-95 (S.D.N.Y. 2001).

With respect to retroactivity, the distinction which Congress has evidently made between the

two triggering events articulated in the clock-stopping provision sufficient to terminate an alien's period of continuous residence -- orders to show cause/notices of intent on the one hand and the commission of certain crimes on the other -- is reasonable when Congress' intent in enacting the transitional rule is properly understood.

Prior to the enactment of the IIRIRA, the time an alien spent in deportation proceedings counted toward the physical presence requirement necessary to be eligible to request a waiver of deportation. *See Appiah v. INS, 202 F.3d 704, 707 (4th Cir. 2000)*; [*16] *Rojas-Reyes, 235 F.3d at 124.* Thus, aliens served with an order to show cause often had a significant incentive to purposely delay their deportation proceedings until they accrued the seven years of continuous residence required to be eligible to request a waiver of deportation. The transitional rule was enacted by Congress to specifically address this circumstance. *See Rojas-Reyes, 235 F.3d at 124; Henry, 175 F. Supp.2d at 695.*

The concern which Congress attempted to address by enactment of the transitional rule -- purposeful delays by aliens against whom deportation proceedings had been initiated so as to later qualify for a waiver of deportation -- is simply not present with respect to aliens such as Generi. Because the clock-stopping provision serves to terminate an alien's period of continuous residence upon the *commission* of certain offenses, as opposed to a *conviction* thereof, the motivation to delay the relevant proceedings discussed above is simply not present.

In sum, while Congress has expressly stated that the clock-stopping provision is to be retroactively applied as to orders to show cause issued prior to the [*17] enactment of the IIRIRA, Congress has made no such affirmative declaration that the clock-stopping is to be applied to crimes committed prior to the enactment of the IIRIRA. Moreover, there exists evidence that had Congress intended the clock-stopping provision to apply retroactively to pre-IIRIRA criminal conduct, it clearly understood how to achieve that result.

In 1986, Congress passed the *Immigration Reform and Control Act of 1986* (IRCA). *See Moosa v. INS, 171 F.3d 994, 999 (5th Cir. 1999).* The IRCA articulated certain amnesty provisions pursuant to which illegal aliens could be granted lawful permanent residence if certain conditions were satisfied. *See Hussein v. Immigration and Naturalization Service, 61 F.3d 377, 378 (5th Cir. 1995).* One of these criteria was that the alien could not have been convicted of a felony. *See Moosa, 171 F.3d at 1000.* The IRCA, however, did not define the term "conviction." *Id.* In the absence of a statutory definition of "conviction," the BIA articulated and employed its own definition.

As part of the IIRIRA, Congress addressed this issue, expressly articulating [*18] a definition of the term "conviction." *See Moosa, 117 F.3d at 1001-02.* The definition of "conviction" articulated by Congress went beyond that adopted by the BIA. *Id. at 1002.* Congress, moreover, *expressly* stated that its definition of "conviction" was to apply "to conviction and sentences entered before, on, or

after" the date of the enactment of the IIRIRA. *Id. at 1006.*

Thus, while this particular provision is not presently relevant, it does tend to demonstrate that when Congress enacted the IIRIRA it was capable of making provisions thereof applicable to pre-IIRIRA criminal conduct. That Congress did so in one context but expressly failed to do so with respect to the provision presently at issue is, in my opinion, even further evidence that Congress did not intend the clock-stopping provision to be applied to criminal conduct (such as Generi's 1974 conviction) which predated the enactment of the IIRIRA.

Such overwhelming evidence regarding Congressional intent -- or lack thereof -- notwithstanding, Respondents nonetheless contend that Congress *has* expressly articulated its desire that the clock-stopping provision be applied [*19] retroactively to pre-IIRIRA conduct.

Respondents assert that "every removal proceeding" conducted pursuant to *8 U.S.C. § 1229(a)* to determine the deportability of an alien is commenced by the filing of a notice to appear. While this statement appears accurate, Respondents further assert that "by making *section 1229b(d)(1)* applicable to orders to show cause issued before, on, or after the effective date of IIRIRA, Congress was unambiguously making that section applicable to all removal proceedings, that

is, proceedings commenced before, on, or after April 1, 1997."[2]

[*20] The question, however, is not whether the clock-stopping provision is applicable to all removal proceedings initiated by a notice to appear or an order to show cause. Rather, the issue is whether a particular change in the law articulated by the IIRIRA (that the commission of certain crimes terminates an alien's period of continuous residence for purposes of seeking a waiver of deportation) will be applied retroactively as to crimes committed prior to the enactment of the IIRIRA.

The clock-stopping provision provides that an alien's s period of continuous residence (for purposes of seeking a waiver of deportation) terminates upon the occurrence of *either* (1) the issuance of a notice to appear/order to show cause, *or* (2) the commission of certain crimes. Congress recognized a reasonable distinction between these two different types of triggering events and while it clearly articulated its desire to retroactively apply the clock-stopping provision as to the former, it was completely silent as to the retroactive application of the clock-stopping provision to the latter.

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2 It should be noted that all the cases to which Respondents cite in support of their argument that Congress has expressly stated its desire to retroactively apply the clock-stopping provision to pre-IIRIRA criminal conduct address a separate issue than that presented by Generi's petition. The cases on which Respondents rely all address the retroactive application of the clock-stopping provision as to orders to show cause issued prior to the enactment of the IIRIRA.

As previously noted, the authority on which Respondents rely in support of their position on this issue is [*21] factually distinct and addresses a circumstance not presently before the Court. I have located only two instances in which courts have examined this issue in the context of the question raised by Generi's petition. Both courts determined that Congress did *not* clearly articulate its desire that the clock-stopping provision be retroactively applied to criminal conducted committed prior to the enactment of the IIRIRA. *See Worrell v. Ashcroft, 207 F. Supp.2d 61, 67 (S.D.N.Y. 2002)* ("Congress did not clearly prescribe *8 U.S.C. § 1229b(d)(1)*s temporal reach"); *Henry v. Ashcroft, 175 F. Supp. 2d 688 (S.D.N.Y. 2001)* (Congress "did not clearly intend for the clock stopping provision to apply retroactively to crimes committed before its effective date"). With respect to this issue, I agree with the conclusion reached by these courts and find that it is consistent with the authority detailed above.

As discussed above, the requisite intent to retroactively apply a statute (or portion thereof) must be evidenced clearly and unambiguously. The most that can be said for Respondents' argument is that it is based on implication and conjecture. [*22] However, such is an insufficient basis from which to conclude that Congress intended to retroactively apply a particular statute (or portion thereof).

B. Does the Statute have a Retroactive Effect
Even assuming that the clock-stopping provision is being retroactively applied by the BIA contrary to Congressional intent, Petitioner

cannot prevail unless he also demonstrates that such application of the statute imposes an impermissible retroactive effect.

As the Supreme Court has held, a statute has an impermissible retroactive effect when it "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *St. Cyr, 533 U.S. at 321.* The Court further stated that the determination whether a particular provision acts retroactively "should be informed and guided by 'familiar considerations of fair notice, reasonable reliance, and settled expectations." *Id.*

Respondents deny that application of the clock-stopping provision as to Petitioner results in an impermissible retroactive effect. In support of their argument, Respondents [*23] first point to Petitioner's 2001 conduct. Specifically, Respondents claim that when Petitioner decided in 2001 "to use and possess controlled substances," he could not have had any expectation that he would be eligible to seek a waiver of deportation given "the language of section 309(c)(5) and case law interpreting that language."

As previously discussed, however, while section 309(c)(5) states that the clock-stopping provision is to be retroactively applied as to notices to appear, neither section 309(c)(5), nor the authority interpreting it, address the retroactive application of the clock-stopping provision to criminal conduct committed prior to the enactment

of the IIRIRA. Accordingly, section 309(c)(5) cannot be said to have given Petitioner notice that the BIA would retroactively apply the clock-stopping provision to criminal conduct committed prior to the enactment of the IIRIRA in a manner inconsistent with both its express language and clearly expressed congressional intent.

Respondents also look to Petitioner's 1974 conduct to support their argument. Specifically, Respondents assert that Petitioner "cannot credibly maintain that when he decided to break and enter with [*24] the intent to commit larceny in 1974 he had any expectations, settled or otherwise, about what the immigration consequences of that conduct might be." Respondents conclude, therefore, that "the fact that those consequences are different today than they were then does not give rise to an impermissible retroactive effect."

In my opinion, however, this argument misses the target. The issue here is not whether Petitioner considered the possible immigration consequences of his actions prior to committing breaking and entering in 1974. Instead, the Court must consider Petitioner's settled expectations as they existed immediately prior to the enactment to the IIRIRA and determine whether the passage of the IIRIRA impermissibly upset those expectations.

Immediately prior to the enactment of the IIRIRA, Petitioner was eligible (under pre-IIRIRA law) to request discretionary relief from deportation. Respondents conceded this point at oral argument. If, for example, Petitioner had been convicted of drug use in 1995 (instead of 2001), he

would have been eligible to seek a waiver of deportation because he had by that time satisfied the residency requirements as articulated in pre-IIRIRA law.

[*25] In other words, through the date of September 29, 1996, the day before the IIRIRA was enacted, Petitioner possessed the settled expectation that if he committed certain deportable offenses (such as drug use) he would nonetheless be eligible to seek a waiver of deportation, his 1974 conviction notwithstanding. The passage of the IIRIRA, however, overturned that settled expectation by, in effect, reaching back 22 years into the past to retroactively modify the immigration consequences of Petitioner's 1974 conduct. As the *Henry* court observed, a "right to discretionary relief is a substantive right" and "it is the retroactive denial of an already accrued eligibility for discretionary relief that gives the clock stopping provision its impermissible retroactive effect." *Henry, 175 F. Supp. 2d at 695-96.*

The *Henry* case is the only reported case which I have located addressing the precise issue presented by Generi's petition - the retroactive application of the clock-stopping provision to criminal conduct committed prior to the enactment of the IIRIRA - and is consistent with the factual circumstance presently before the Court.

Jenny Henry arrived in the United States [*26] in 1984, and was convicted of petit larceny in 1987. *Id. at 691.* In 2000, Henry was twice convicted of petit larceny, rendering her deportable.

After being found deportable, Henry petitioned for a waiver of removal. The BIA denied Henry's request on the ground that the clock-stopping provision applied retroactively to her 1987 conviction, thus terminating her period of continuous residence (for purposes of seeking a waiver of removal) prior to establishing the necessary seven years continuous residence. *Id.*

Absent the retroactive application of the clock-stopping provision, Henry (just like Generi) would have qualified to seek a waiver of deportation. In her petition for writ of habeas corpus, Henry asserted the very claim asserted presently by Generi, namely that the clock-stopping provision was unlawfully applied retroactively to criminal conduct committed prior to the enactment of the IIRIRA, thus unlawfully precluding her from seeking a waiver of deportation.

The *Henry* court first determined that Congress "did not clearly intend for the clock stopping provision to apply retroactively to crimes committed before its effective date." *Id. at 695.* [*27] With respect to whether retroactive application of the clock-stopping provision imposed upon Henry an impermissible retroactive effect, the court concluded that "a right to discretionary relief is a substantive right, and the elimination of even the possibility of obtaining relief thus has a retroactive effect." *Id. at 696* (citing *Warden, Lewisburg Penitentiary v. Marrero, 417 U.S. 653, 663, 41 L. Ed. 2d 383, 94 S. Ct.2532 (1974)).* As discussed herein, I concur with the *Henry* court's resolution of this matter.

I have located only one other reported decision, *Worrell v. Ashcroft, 207 F. Supp.2d 61 (W.D.N.Y. 2002)*, which addresses the general issue presented by Generi's petition - the retroactive application of the clock-stopping provision to criminal conduct committed prior to the enactment of the IIRIRA. While this case is factually distinct and, therefore, not directly applicable to the circumstance presently before the Court, it nonetheless indirectly supports the conclusion reached by the *Henry* court.

In *Worrell,* the court examined the application of the clock-stopping provision as to criminal conduct which occurred in 1990. *Id. at 62.* [*28] The court undertook the same two-step analysis identified above, first concluding that "Congress did not clearly prescribe *8 U.S.C. § 1229b(d)(1)*s temporal reach." *Id. at 67.* With respect to whether the retroactive application of the clock-stopping provision as to Worrell resulted in a "retroactive effect," the court concluded that it did not. *Id. at 67-69.* The basis for this conclusion, however, is distinguishable from the circumstance presently before the Court. Specifically, the court observed that because Worrell "was never eligible" to request a waiver of deportation, the enactment of the IIRIRA did not result in a "retroactive effect." Importantly, however, the court, in articulating this distinction, discussed with approval the *Henry* decision.

In conclusion, for the reasons articulated herein, I conclude that the retroactive application of the clock-stopping provision as to Petitioner violates clearly established federal as articulated

by the United States Supreme Court in *Landgraf* and its progeny.

CONCLUSION

For the reasons articulated herein, I recommend that Generi's petition for writ of habeas corpus [*29] be **granted** and that he be permitted to apply for a waiver of deportation.

OBJECTIONS to this Report and Recommendation must be filed with the Clerk of Court within ten (10) days of the date of service of this notice. *28 U.S.C. § 636(b)(1)(C).* Failure to file objections within the specified time waives the right to appeal the District Court's order. *Thomas v. Arn, 474 U.S. 140, 88 L. Ed. 2d 435, 106 S. Ct. 466 (1985); United States v. Walters, 638 F.2d 947 (6th Cir.1981).*

Respectfully submitted,

Date: February 19, 2004

s/

ELLEN S. CARMODY
United States Magistrate Judge

No. 08-541

In the Supreme Court of the United States

LEONARDO ZULUAGA-MARTINEZ, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

To qualify for cancellation of removal under Section 240A of the Immigration and Nationality Act, 8 U.S.C. 1229b(a), enacted in 1996, an applicant must establish that he "has resided in the United States continuously for 7 years after having been admitted in any status," but the period of continuous residence is "deemed to end" when the applicant "has committed an offense" that renders the alien inadmissible or removable from the United States. 8 U.S.C. 1229b(d)(1).

The question presented is whether petitioner's commission of a controlled-substance offense in 1995, before he had accrued seven years of continuous residence, prevents him from qualifying for cancellation of removal under Section 240A by virtue of the "stop-time rule" that was enacted in 1996.

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In the Supreme Court of the United States

No. 08-541

LEONARDO ZULUAGA-MARTINEZ, PETITIONER

v.

IMMIGRATION AND NATURALIZATION SERVICE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A3-A55) is reported at 523 F.3d 365. The orders of the Board of Immigration Appeals (Board) (Pet. App. A56-A62) and the immigration judge (Pet. App. A63-A65) are unreported. Prior relevant orders of the Board (Pet. App. A66-A68, A69-A70, A77-A79, A80-A82) and the immigration judge (Pet. App. A71-A76, A83-A87) are also unreported.

JURISDICTION

The judgment of the court of appeals was entered on April 23, 2008. A petition for rehearing was denied on July 23, 2008 (Pet. App. A1-A2). The petition for a writ of certiorari was filed on October 21, 2008. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 237 of the Immigration and Nationality Act (INA), 8 U.S.C. 1227, provides that several classes of aliens are subject to removal, including those who "ha[ve] been convicted of a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance." 8 U.S.C. 1227(a)(2)(B)(i).

Until 1996, former Section 212(c) of the INA, 8 U.S.C. 1182(c) (1994) (repealed 1996), authorized a permanent resident alien domiciled in the United States for seven consecutive years to apply for discretionary relief from being excluded from the country. By its terms, Section 212(c) "was literally applicable only to exclusion proceedings," but it was construed as applying to deportation proceedings as well. *INS* v. *St. Cyr*, 533 U.S. 289, 295 (2001).[1]

In the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Congress amended Section 212(c) to make ineligible for discretionary relief any alien previously convicted of certain offenses, including controlled-substance offenses and aggravated felonies. See Pub. L. No. 104-132, § 440(d), 110 Stat. 1277. Later that year, in the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 (IIRIRA), Congress repealed Section 212(c) altogether, see Pub. L. No. 104-208, Div. C, § 304(b), 110 Stat. 3009-597, and replaced it with Section 240A of the INA, 8 U.S.C. 1229b, which provides for a more-limited form of discretionary relief. Section

[1] The Ninth Circuit recently construed Section 212(c) in accordance with its literal terms and held that it is inapplicable to an alien (like petitioner) who is already in the United States and in deportation (or the equivalent of deportation) proceedings. See *Abebe* v. *Mukasey*, No. 05-76201, 2009 WL 50120 (Jan. 5, 2009) (en banc).

240A provides the Attorney General with discretion to cancel the removal of an alien who:

> (1) has been an alien lawfully admitted for permanent residence for not less than 5 years,
>
> (2) has resided in the United States continuously for 7 years after having been admitted in any status, and
>
> (3) has not been convicted of any aggravated felony.

8 U.S.C. 1229b(a). Section 240A(d) sets forth rules for computing the time of continuous residence, including the so-called "stop-time rule":

> **(1) Termination of continuous period**
>
> For purposes of this section, any period of continuous residence or continuous physical presence in the United States shall be deemed to end (A) * * * when the alien is served a notice to appear under section 1229(a) of this title, or (B) *when the alien has committed an offense* referred to in section 1182(a)(2) of this title that renders the alien inadmissible * * * or removable from the United States under section 1227(a)(2) or 1227(a)(4) of this title, whichever is earliest.

8 U.S.C. 1229b(d)(1) (emphasis added). The "offenses referred to in section 1182(a)(2)" include controlled-substance offenses. See 8 U.S.C. 1182(a)(2)(A)(i)(II).

In *St. Cyr*, this Court held, based on principles of non-retroactivity, that IIRIRA's repeal of Section 212(c) should not be construed to apply to an alien convicted of an aggravated felony on the basis of an agreement to plead guilty that was made at a time when the resulting conviction would not have rendered the alien ineligible for relief under Section 212(c). 533 U.S. at 314-326.

2. a. Petitioner, a native and citizen of Colombia, entered the United States illegally in 1985 (Pet. App. A5), applied for adjustment of status on May 4, 1988 (*id.* at A8, A59-A60), and became a legal permanent resident on December 1, 1990 (*id.* at A5). On April 9, 1995, he was arrested for possession of heroin. *Id.* at A5, A74. In 1998, he was convicted in Massachusetts state court, based on a guilty plea, of illegal possession of drugs and three counts of assault and battery, for which he was sentenced to an 18-month term of imprisonment. *Ibid.* In March 1999, he was again convicted of illegal possession of heroin in violation of Massachusetts law, in connection with a 1997 arrest. *Id.* at A5.

b. On June 25, 1998, the Immigration and Naturalization Service (INS) served petitioner with a notice to appear, charging him with being removable under 8 U.S.C. 1227(a)(2)(B)(i), on account of his having been convicted of a controlled-substance offense. Pet. App. A5, A84.[2] The INS also later charged petitioner with being removable as an aggravated felon under 8 U.S.C. 1227(a)(2)(A)(iii). Pet. App. A5.

On May 25, 1999, at a hearing before an immigration judge, petitioner admitted all of his convictions, and the immigration judge found petitioner was removable and ineligible for cancellation of removal under Section 240A(a)(3), 8 U.S.C. 1229b(a)(3), because his 1998 assault and battery convictions were aggravated felonies. Pet. App. A5-A6, A83-A87. While petitioner's appeal of that decision was pending, his assault and battery convictions were vacated by a state court because he had not been advised of the immigration consequences of a

[2] The INS's immigration-enforcement functions have since been transferred to the Department of Homeland Security. See 6 U.S.C. 251.

conviction before pleading guilty. *Id.* at A6, A78. As a result, the Board granted petitioner's motion to reopen, allowing him to pursue his application for cancellation of removal. *Id.* at A77-A79.

c. In June 2000, on remand in the reopened proceeding, the immigration judge held that petitioner was statutorily ineligible for cancellation of removal, because he had failed to accrue seven years of continuous lawful permanent residence, as required by Section 240A(a)(2), 8 U.S.C. 1229b(a)(2). Pet. App. A71-A76. The immigration judge determined that petitioner's period of lawful residence did not begin to accrue until the date he applied for temporary resident status (May 4, 1988) and that, by operation of the stop-time rule of 8 U.S.C. 1229b(d)(1), that period ended when he committed his first controlled-substance offense less than seven years later (April 9, 1995). Pet. App. A74-A75. The Board summarily affirmed. *Id.* at A69-A70.

Petitioner filed a petition for habeas corpus in the United States District Court for the Western District of New York, which vacated the removal order and remanded the case for consideration of newly discovered evidence potentially affecting when petitioner was originally admitted to the United States. See Pet. App. A7, A68. In April 2002, the immigration judge, after considering further evidence, denied relief. *Id.* at A7, A64; see Certified Admin. R. 249-258. In May 2002, the immigration judge denied a motion to reconsider. Pet. App. A63-A65. The Board dismissed petitioner's appeals of the denial of relief and of reconsideration, concluding that petitioner had not accrued the seven years of continuous residence necessary to be eligible for cancellation of removal, and noting that he had not been eligible for any

discretionary "relief available at the time of his crime." *Id.* at A56-A62.

3. a. Petitioner filed a petition for review in the United States Court of Appeals for the Second Circuit, which denied the petition. Pet. App. A3-A55. The court rejected petitioner's contention that the stop-time rule in Section 240A is impermissibly retroactive when applied to criminal conduct that preceded its enactment. Applying this Court's two-step test for retroactivity analysis in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), the court of appeals first held that Congress had not "expressly prescribed" that the stop-time rule be applied to criminal offenses committed before IIRIRA's enactment. Pet. App. A14-A19.

Proceeding to the second step of the *Landgraf* analysis, the court held that the stop-time rule would not have an impermissible retroactive effect if applied to petitioner's 1995 offense, because it did not attach any new disability to his past acts. Pet. App. A21-A30. The court noted that *St. Cyr* calls for the exercise of a "commonsense, functional judgment about whether [a] new provision attaches new legal consequences to events completed before its enactment." *Id.* at A21 (quoting *St. Cyr*, 533 U.S. at 321). It then concluded that "the determinative event" in petitioner's case was his commission of a drug offense, rather than the later date of his conviction, because petitioner had engaged in no relevant "secondary conduct" after committing the offense. *Id.* at A22. It explained that deportation was not only the consequence of the retroactive application of the stop-time rule, but would also have been "the consequence [petitioner] would have received immediately following his criminal conduct." *Id.* at A23. The court distinguished *Landgraf* by noting that petitioner's case lacks

"changed consequences," because, at the time IIRIRA was enacted, petitioner had already committed a crime that "placed him in a category of aliens eligible for deportation upon conviction." *Id.* at A25-A26.

The court of appeals added that its decision "remains sound when reasonable reliance is taken into consideration." Pet. App. A26. Even if petitioner could show that he had "somehow improbably relied on the absence of the stop-time rule when he committed" his controlled-substance offense, "the retroactive application of the stop-time rule did not alter the legal consequence of his actions," and petitioner could not show any "subsequent reliance," since he "did not later enter into a transaction or engage in conduct in reliance on the availability of discretionary relief." *Id.* at A28-A29.

Finally, the court concluded that its decision was consistent with the "familiar considerations of fair notice . . . and settled expectations," Pet. App. A30 (quoting *St. Cyr*, 533 U.S. at 321), because petitioner knew when he acted that he would be deportable if convicted of a drug crime.

b. In a concurring opinion, Judge Straub disagreed with the court's conclusion that the retroactive application of the stop-time rule to petitioner's case did not change the consequences of his criminal act, because petitioner was not actually convicted before seven years elapsed. Pet. App. A31-A36. Nevertheless, Judge Straub concurred with the majority's denial of relief because petitioner could not demonstrate the type of detrimental reliance he believed to be required by circuit precedent. *Id.* at A36-A42. Judge Straub then recounted "controversy among, within, and surrounding the courts of appeals" about whether reliance is required to establish an impermissible retroactive effect,

and, if so, whether it should be subjective or objective reliance. *Id.* at A36-A55. Finally, he suggested that "perhaps" the Second Circuit should revisit or review "whether and to what extent a showing of reliance on the prior law is required to demonstrate impermissible retroactive effect." *Id.* at A55.

The majority, however, disagreed with Judge Straub's characterization of the Second Circuit's use of reliance. Pet. App. A26 n.4. Although it acknowledged that "reliance has played an important role in our retroactivity cases in the immigration context," the court expressly rejected the suggestion that an immigrant "must show reliance in every case," and it concluded that other factors are also relevant (including fair notice and settled expectations). *Ibid.*

ARGUMENT

Petitioner contends (Pet. 15-21) that the court of appeals misapplied this Court's cases in concluding that the stop-time rule in Section 240A(d)(1)(B) of the INA, 8 U.S.C. 1229b(d)(1)(B), does not have a retroactive effect on him. He also asserts (Pet. 21-30) that there is a conflict in the courts of appeals about whether a showing of "actual reliance" on prior law is an essential element of a retroactivity claim under *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994). The decision below is correct, and the court of appeals' holding—which, contrary to petitioner's repeated characterizations, did not require proof of actual reliance—does not squarely conflict with decisions of this Court or of other courts of appeals.

1. Petitioner first challenges the court of appeals' application of the second step of the retroactivity analysis prescribed by *Landgraf*, arguing that it erroneously

evaluated the retroactive effect of the stop-time rule from the point at which he committed a controlled-substance offense, rather than at a later point in time (when he did nothing). The court of appeals correctly stated and reasonably applied this Court's test for retroactivity. In any event, petitioner has failed to identify any conflict with another court of appeals and seeks only error correction from this Court.

a. Although this Court has recognized a presumption against retroactive legislation, *Landgraf*, 511 U.S. at 265, "it is beyond dispute that, within constitutional limits, Congress has the power to enact laws with retrospective effect." *INS* v. *St. Cyr*, 533 U.S. 289, 316 (2001). Where Congress has not expressly addressed whether a statute should apply retroactively, a court must decide whether applying the statute "takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or *attaches a new disability, in respect to transactions or considerations already past.*" *Landgraf*, 511 U.S. at 269 (emphasis added; citation and internal quotation marks omitted). "A statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment or upsets expectations based in prior law." *Ibid.* (citation omitted). Rather, "[t]he conclusion that a particular rule operates 'retroactively' comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event." *Id.* at 269-270. That inquiry "demands a *commonsense, functional judgment* about 'whether the new provision attaches new legal consequences to events completed before its enactment.'" *St. Cyr*, 533 U.S. at 321 (emphasis added;

citations and some internal quotation marks omitted). The Court has also explained that "the legal effect of conduct should ordinarily be assessed under the law that existed *when the conduct took place*." *Landgraf*, 511 U.S. at 265 (emphasis added; internal quotation marks omitted).

Citing *Landgraf* and *St. Cyr*, as well as this Court's decision in *Hughes Aircraft Co.* v. *United States ex rel. Schumer*, 520 U.S. 939, 947 (1997), the court of appeals held that petitioner could not show "that the new law attaches a new disability on past acts," and it thus held that the application of the stop-time rule to his application for cancellation of removal was not impermissibly retroactive. Pet. App. A22-A23. Accordingly, the court of appeals rejected petitioner's contention that, for an alien who was both convicted and put into removal proceedings after IIRIRA's effective date, the application of the stop-time rule at the point he committed the relevant crime was impermissibly retroactive.

b. Petitioner contends (Pet. 16-21) that the court of appeals misapplied the second step of *Landgraf*'s retroactivity analysis by using an "unorthodox approach" involving "hypothetical scenarios." He claims that he "had the right to seek a waiver [of deportation under former Section 212(c)] so long as *the conviction and final order of removal* were entered *after*" he had acquired seven years of residency. Pet. 17 (first emphasis added). That claim is flawed.

Petitioner incorrectly assumes that he had a legitimate expectation of relief from deportation or removal, but he could not even apply for cancellation of removal under Section 240A until it took effect on April 1, 1997. See generally *Rojas-Reyes* v. *INS*, 235 F.3d 115, 120 (2d Cir. 2000). Thus, the stop-time rule did not prevent him

from qualifying for a form of relief that had been available to him when he committed his crime in 1995. Cf. *St. Cyr*, 533 U.S. at 321-325.

Petitioner also incorrectly assumes (Pet. 16-21)—as did Judge Straub in his concurring opinion (Pet. App. A31-A36)—that the court of appeals' decision depended upon the "hypothetical possibility" of petitioner's conviction, removal proceedings, and order of removal, before he acquired his seven years of residency for either suspension of deportation or waiver under Section 212(c). In fact, the court of appeals correctly determined, on the facts, that on the relevant date of the determinative event—the commission of the drug offense on April 9, 1995—petitioner was not eligible for any type of relief, and that the only consequence that attached to his actual conduct would be his ultimate deportability. *Id.* at A22-A23. As this Court stated in *Landgraf*, "[t]he legal effect of conduct should ordinarily be assessed under the law that existed *when the conduct took place*." 511 U.S. at 265 (emphasis added) (quoting *Kaiser Aluminum & Chem. Corp.* v. *Bonjorno*, 494 U.S. 827, 855 (1990)). Thus, the court of appeals correctly rejected any suggestion that its retroactivity analysis should be based on the period *after* his commission of the criminal offense, when petitioner did not engage in any relevant conduct during that period. Pet. App. A22-A26.[3]

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[3] Petitioner suggests (Pet. 26 n.9) that, even judging from the point at which he committed his 1995 crime, he may well have been relying on the looming seven-year threshold. He does not, however, cite any courts of appeals that disagree with the decision below, which indicated it would apply its "reliance" analysis to secondary conduct (such as a decision whether to apply for relief or to plead guilty) but not to the primary conduct of committing a crime. Pet. App. A29 ("[I]t makes no sense at all to ask whether an alien, in committing a drug trafficking

Both petitioner (Pet. 17-18) and the concurring opinion below (Pet. App. A33-A35) argue that, if he had hypothetically been convicted and put into removal proceedings prior to IIRIRA, under the statute that applied at the time he committed his offense, petitioner would have been eligible to continue accruing time toward the seven-year residency requirement to apply for Section 212(c) relief.[4] But petitioner is applying for cancellation

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offense, acted with an intention to preserve [his or her] eligibility for relief under § 212(c).") (citation and internal quotation marks omitted) (second brackets in original). In fact, other courts of appeals have echoed the same sentiment. See, *e.g.*, *Valencia-Alvarez* v. *Gonzales*, 469 F.3d 1319, 1327 (9th Cir. 2006) ("[U]nlike the plea at issue in *St. Cyr*, where the alien arguably bargained for something on the basis of existing immigration law, Valencia-Alvarez cannot assert that he relied on existing immigration law when he decided to commit a crime."); *Jurado-Gutierrez* v. *Greene*, 190 F.3d 1135, 1150-1151 (10th Cir. 1999), cert. denied, 529 U.S. 1041 (2000); *LaGuerre* v. *Reno*, 164 F.3d 1035, 1041 (7th Cir. 1998), cert. denied, 528 U.S. 1153 (2000).

[4] In the court of appeals, both the majority and Judge Straub treated the seven-year-residency requirement for eligibility for "suspension of deportation" as being interchangeable with the seven-year-residency requirement of Section 212(c). In fact, petitioner would *not* have been eligible for suspension of deportation at any time before or after IIRIRA. To be eligible for suspension of deportation, an alien, like petitioner, convicted of a controlled-substance offense under 8 U.S.C. 1251(a)(2)(B)(i) (1994) (recodified at 8 U.S.C. 1227(a)(2)(B)(i)), was required to have a physical presence in the United States for a continuous period of "not less than ten years *immediately following* the commission of an act, or the assumption of a status, constituting a ground for deportation." 8 U.S.C. 1254(a)(2) (1994) (repealed 1996) (emphasis added). Thus, in petitioner's case, because he did not commit the controlled-substance offense until April 9, 1995, and did not plead guilty to that offense until May 1998 (Pet. App. A5), and only then became deportable for having been convicted of a controlled-substance offense (*id.* at A5-A8), petitioner would have been ineligible for the discretionary relief of suspension of deportation upon commencement of his proceed-

of removal under Section 240A rather than for Section 212(c) relief. See, *e.g.*, *id.* at A78. He was not convicted of his controlled-substance offense until May 1998, and was put into removal proceedings in June 1998, long after the April 1, 1997 effective date of IIRIRA. *Id.* at A5. Under the applicable law in 1998, therefore, cancellation of removal under 8 U.S.C. 1229b(a), with its seven-year residency requirement, was the only relief available to petitioner, since both Section 212(c) and suspension of deportation had been repealed. See, *e.g.*, *Perez* v. *Elwood*, 294 F.3d 552, 560-561 (3d Cir. 2002) (because an alien's deportability is triggered by his conviction, he is not "even potentially eligible for [Section] 212(c) relief until after he was convicted"); see generally *Medina* v. *Gonzales*, 404 F.3d 628, 634 n.4 (2d Cir. 2005); *Rojas-Reyes*, 235 F.3d at 120.

c. Petitioner does not even claim that there is any conflict in the courts of appeals on the stop-time question involved in this case. Cf. Pet. 18 n.2 (citing two district-court opinions about retroactive application of the stop-time rule). In fact, the only other court of appeals decision to address circumstances similar to petitioner's—where the criminal conduct of an applicant for cancellation of removal pre-dated IIRIRA, but the conviction and the removal proceedings both came after IIRIRA—the Ninth Circuit held that the application of the stop-time rule at the point when a pre-IIRIRA of-

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ings on June 25, 1998, or even upon the Board's final decision on November 5, 2003. Cf., *e.g.*, *Valencia-Alvarez*, 469 F.3d at 1327-1328 (finding no impermissible retroactive effect in the denial of pre-IIRIRA relief because the alien had not been in the United States long enough to qualify for discretionary relief from deportation at the time he committed the underlying offense, at the time he was convicted, or when IIRIRA became effective).

fense was committed was not impermissibly retroactive. See *Valencia-Alvarez* v. *Gonzales*, 469 F.3d 1319, 1327-1330 (9th Cir. 2006).

Especially in the absence of a conflict, petitioner provides no reason to conclude that the alleged error in applying retroactivity analysis in the narrow class of cases involving the seven-year-residency test in the context of post-IIRIRA convictions for pre-IIRIRA crimes presents such an important federal question that it warrants review by this Court.

2. Petitioner also argues that the Second Circuit has "cases which actually *require* reliance in order to find an impermissible retroactive effect" (Pet. 22), that those cases are inconsistent with this Court's cases (Pet. 25-27), and that "[t]here is a clear split" in the courts of appeals "as to whether reliance must be established to demonstrate that a law has a retroactive effect" (Pet. 27). There is, however, no conflict between the court of appeals' reasoning and this Court's precedents, and this case in any event would be an inappropriate vehicle for resolving any disagreement about the use of reliance in retroactivity analysis.

a. Petitioner repeatedly contends (Pet. 15, 21, 25-26 & n.8) that the court of appeals erred by "requir[ing]" him to demonstrate actual, detrimental reliance on the pre-IIRIRA state of the law in order to show an impermissible retroactive effect. The court of appeals, however, specifically rejected that characterization of its holding. See Pet. App. A26 n.4 ("[W]e have never stated that petitioners must show reliance in every case."). Moreover, the court also stated that it would still reach the same result even if petitioner had actually "relied on the absence of the stop-time rule when he committed the

offense." *Id.* at A29. That alone suffices to make further review of this question unwarranted in this case.[5]

b. When stripped of petitioner's recharacterization of its reasoning, the court of appeals' opinion—which took account of reliance, but did not make it dispositive—was obviously not inconsistent with this Court's cases. In fact, its reasoning was not even inconsistent with petitioner's own account of this Court's cases. Petitioner concedes (Pet. 23) that "detrimental reliance" may "be illustrative" in certain cases—and that this Court's opinion in *St. Cyr* "emphasized the detrimental reliance by the respondent and other similarly-situated individuals." By taking "reasonable reliance * * * into consideration" (Pet. App. A26), along with fair notice and settled expectations (*id.* at A30), the court of appeals here was faithfully following this Court's lead. See *Landgraf*, 511 U.S. at 270 ("Any test of retroactivity * * * is unlikely to classify the enormous variety of legal changes with

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[5] The actual-reliance rule that petitioner infers from prior Second Circuit cases does not stem from cases involving circumstances like his own. In the cases petitioner cites (Pet. 25), the Second Circuit dealt with aliens who had not only committed their crimes before IIRIRA but who also pleaded guilty or were otherwise convicted before IIRIRA. See *Singh* v. *Mukasey*, 520 F.3d 119 (2008); *Wilson* v. *Gonzales*, 471 F.3d 111 (2006); *Thom* v. *Ashcroft*, 369 F.3d 158 (2004), cert. denied, 546 U.S. 828 (2005); *Rankine* v. *Reno*, 319 F.3d 93, cert. denied, 540 U.S. 910 (2003). As the court of appeals noted here, the only conduct of petitioner's that preceded IIRIRA was his commission of a controlled-substance offense. After that, he "did no more than passively await the outcome of his prosecution" (Pet. App. A22), which took place after IIRIRA's effective date.

Of course, to the extent that petitioner relies upon disagreement between the majority of the court of appeals and Judge Straub about the import or applicability of prior circuit precedent, this Court does not sit to resolve such intra-circuit disputes. See *Wisniewski* v. *United States*, 353 U.S. 901, 902 (1957) (per curiam).

perfect philosophical clarity. However, * * * familiar considerations of fair notice, reasonable reliance, and settled expectations offer sound guidance."); *St. Cyr*, 533 U.S. at 321 ("As we have repeatedly counseled, the judgment whether a particular statute acts retroactively should be informed and guided by familiar considerations of fair notice, reasonable reliance, and settled expectations.") (citations and internal quotation marks omitted).

This Court recently confirmed the importance of reliance in *St. Cyr*'s retroactivity analysis. In *Fernandez-Vargas* v. *Gonzales*, 548 U.S. 30 (2006), the Court described *St. Cyr* as having "emphasized that plea agreements involve a *quid pro quo* * * * in which a waiver of constitutional rights * * * had been exchanged for a perceived benefit * * * valued in light of the possible discretionary relief, a focus of expectation and reliance." *Id.* at 43-44 (internal quotation marks omitted). Distinguishing the situation of *Fernandez-Vargas* from that of *St. Cyr*, the Court remarked that, "before IIRIRA's effective date Fernandez-Vargas never availed himself of [provisions providing for discretionary relief] or took action that enhanced their significance to him in particular, as St. Cyr did in making his *quid pro quo* agreement." *Id.* at 44 n.10.

c. Nor is there any direct conflict between the decision below and those of other courts of appeals. While petitioner cites (Pet. 27-29) cases dealing with the question of whether reliance is necessary to show a retroactive effect, and if so, whether it should be subjective or objective reliance, none of those cases involved application of the stop-time rule to pre-IIRIRA offenses, nor circumstances (like petitioner's) in which the relevant criminal conviction postdated IIRIRA's effective date.

Instead, they generally involved the retroactive effect of the repeal of Section 212(c), as applied to aliens who had committed crimes and had pleaded guilty or had been convicted *before it was repealed.* One exception is the Fourth Circuit's decision in *Olatunji* v. *Ashcroft*, 387 F.3d 383 (2004) (cited at Pet. 29), which involved the loss of an alien's ability to take brief trips abroad without subjecting himself to removal proceedings, *id.* at 396, rather than loss of access to Section 212(c) relief. But *Olatunji* predated this Court's decision in *Fernandez-Vargas* reiterating the relevance of reliance as a factor in retroactivity analysis. *Olatunji* also illustrates the importance of comparing cases involving the same statutory provisions, since *Olatunji* itself (which eschewed using reliance as a component of retroactivity analysis) distinguished a prior Fourth Circuit decision that had considered reliance in the context of Section 212(c)'s repeal. *Id.* at 392 (discussing *Chambers* v. *Reno*, 307 F.3d 284, 293 (4th Cir. 2002); see also *Mbea* v. *Gonzales*, 482 F.3d 276, 281-282 (4th Cir. 2007) (post-*Olatunji* decision, following *Chambers* and holding that the repeal of Section 212(c) "did not produce an impermissibly retroactive effect as applied to an alien convicted after [pre-IIRIRA] trial," because, by deciding to go to trial rather than plead guilty, the alien had not relied on the potential for discretionary relief).[6]

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[6] Among the 11 other cases petitioner cites (Pet. 27-29 & n.11), only four did not involve the relevance of pre-repeal convictions to Section 212(c)'s repeal. Like *Olatunji*, *Camins* v. *Gonzales*, 500 F.3d 872 (9th Cir. 2007), involved brief trips abroad, though the court required a showing of objective reliance, which was satisfied in that case by a pre-IIRIRA guilty plea. *United States* v. *De Horta Garcia*, 519 F.3d 658 (7th Cir.), cert. denied, 129 S. Ct. 489 (2008), presented a question about the retroactive repeal of Section 212(c), though it involved a post-

Moreover, as noted above, the decision below did not hold that reliance is a necessary factor in proving an impermissibly retroactive effect. By treating reliance as a relevant (though not necessary) factor, and siding against petitioner *even on the assumption that he could show actual reliance* (Pet. App. A26 n.4, A29), the court of appeals' reasoning has obviated the significance of any conflicts about the role of reliance for purposes of this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AEDPA, pre-IIRIRA conviction. In *Brooks* v. *Ashcroft*, 283 F.3d 1268 (11th Cir. 2002), the court considered an Equal Protection challenge and found that it had no jurisdiction to address retroactivity. See *id.* at 1274 & n.6. *Davey* v. *City of Omaha*, 107 F.3d 587 (8th Cir. 1997), arose outside the immigration context.

Supreme Court, U.S.
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No. 08-541

IN THE
SUPREME COURT OF THE UNITED STATES

LEONARDO ZULUAGA-MARTINEZ,

Petitioner,

v.

IMMIGRATION AND NATURALIZATION SERVICE

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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The Government's Opposition Brief ("Opp.")[1], sidesteps the fundamental issue presented in the petition: whether the application of the stop-time rule to Mr. Zuluaga-Martinez amounts to impermissible retroactive effect. Indeed, the question presented by the Government ignores the issue of retroactivity entirely. *See* Opp. I. It responds to the petition with an irrelevancy—the form-over-substance argument that Mr. Zuluaga-Martinez cannot even raise the question of retroactivity because he ultimately applied for cancellation of removal under INA § 240A rather than applying for a discretionary waiver under § 212(c), a remedy repealed only *after* his required period of lawful presence would have been satisfied but for the retroactivity analysis. *See* Opp. 10-11; 12-13.

Indisputably, the retroactive application of the stop-time rule attached "new legal consequences to events completed before its enactment." *See INS v. St. Cyr*, 533 U.S. 289, 321 (2001). Under the lower court's retroactively analysis, in 1997, two years after the seven-year period between May 1988 and May 1995 expired, the stop-time rule came into effect and retroactively cut short the required seven year period as of April 1995—one month before its attainment. The change of circumstances is clear: but for the retroactive application of the stop-time rule, Mr. Zuluaga-Martinez would have been eligible to apply for a waiver of deportation under INA § 212(c), a waiver provision that was then provided by law. The application of IIRIRA, through the retroactive application of the stop-time rule by the

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[1] All capitalized terms have the same meaning as set forth in the opening petition ("Pet.").

court below, stripped Mr. Zuluaga-Martinez of his claim to § 212(c) eligibility, resulting in changed legal circumstances and an impermissible retroactive effect.

While the Government concedes, as it must, that the circuit courts are conflicted as to whether reliance is a necessary element of retroactivity analysis, *see* Opp. 16-17, it argues that this split is irrelevant here. This argument, however, does not address Petitioner's point that the Second Circuit has ignored this Court's decisions by imposing on litigants the burden of proving that they would have been harmed by the statute under all conceivable hypothetical scenarios, and that they subjectively and actually relied upon the prior law. *See* Pet. 19-20; 21-30. The Court should address this issue now to resolve the split among the circuits on the necessity of reliance and to correct the trend among the circuits as they veer ever further away from the flexible retroactivity framework that this Court has repeatedly adopted and applied.

ARGUMENT

I. Application of the Stop-Time Rule to Mr. Zuluaga-Martinez Would Have an Impermissible Retroactive Effect

Instead of addressing the issue raised by this petition head-on, the Government argues disjointedly that the Court should avoid consideration of Mr. Zuluaga-Martinez's petition: (a) because Mr. Zuluaga-Martinez's application was under § 240A rather than § 212(c), *see* Opp. 10-11, 12-13; (b) because the Ninth Circuit (in a completely different factual scenario, as explained below)

allegedly reached a similar result to the one reached by the Second Circuit here, *see* Opp. 13-14; and (c) because the Second Circuit's decision purportedly did not rest on a counter-factual analysis after all, *see* Opp. 11. Each of these arguments is addressed in turn below, but the fact that the Government has chosen to focus on these ancillary issues should not shift the Court's attention away from the key issue: whether the Second Circuit's majority decision conflicts with this Court's prior retroactivity decisions.

a. It is Immaterial that Mr. Zuluaga-Martinez Applied for Cancellation of Removal Under § 240A Rather than a Discretionary Waiver of Deportation Under the Repealed § 212(c)

The Government argues that because Mr. Zuluaga-Martinez applied for § 240A relief, rather than for relief under the then-already-repealed § 212(c), he somehow lost the opportunity to argue that § 240A's stop-time rule—as applied to him—is impermissibly retroactive. *See* Opp. 12-13. The Government cites no authority supporting this argument,[2] which turns this Court's retroactivity

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[2] In fact, in a case repeatedly cited by the Government and described as "the only other court of appeals decision to address circumstances similar to petitioner's," *see* Opp. 13, the Ninth Circuit (like the Second Circuit here) implicitly *rejected* the Government's position by considering the very argument the Government claims is unavailable in this case—that the stop-time rule is impermissibly retroactive—even though there too the petitioner had applied for cancellation of removal under § 240A rather than a discretionary waiver of deportation under

rules on their head. As noted by the Government, "[t]he legal effect of conduct should ordinarily be assessed under the law that existed *when the conduct took place*." *See* Opp. 11 (emphasis in original) (quoting *Landgraf v. USI Film Prods.*, 511 U.S. 244, 265 (1994)). The fact that the Government waited until after the passage of IIRIRA to initiate removal proceedings in a particular case, making § 240A rather than § 212(c) the applicable statute for application for relief, does not make the retroactive application of IIRIRA to certain pre-IIRIRA conduct any more permissible.[3] The "special concerns" raised by retroactive statutes like IIRIRA, *see St. Cyr*, 533 U.S. at 315, are not diminished based on whether the relief is called "cancellation of removal" or "waiver of deportation" or by where in the United States Code the relevant statutory relief is found. What matters is that the statute to be retroactively applied "creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past." *St. Cyr*, 533 U.S. at 321.

Critically, in May 1995, Mr. Zuluaga-Martinez became eligible to apply for a waiver of deportation under § 212(c) should he have needed one. He would have been able to seek such relief but for the lower court's application of the stop-time rule. The fact

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the repealed § 212(c). *See Valencia-Alvarez v. Gonzales*, 469 F.3d 1319, 1322-23 (9th Cir. 2006).

[3] The Government seems to be saying that because 212(c) was repealed, Congress necessarily intended IIRIRA to have full retroactive effect, including its stop-time rule. Of course, that is not the case. The repeal of a prior statute is not shorthand for the requirement that retroactive effect be explicitly stated. *See Landgraf*, 511 U.S. at 263; *St. Cyr*, 533 U.S. at 314-320.

that Mr. Zuluaga-Martinez was never in the position to actually apply for § 212(c) relief—because the Government did not initiate removal proceedings before the repeal of § 212(c)—is not a basis on which to predicate forfeiture of the right he clearly possessed in May 1995 to seek such relief.

b. The Ninth Circuit in *Valencia-Alvarez* Explicitly Ruled That Aliens Like Mr. Zuluaga-Martinez Were Eligible for § 212(c) Relief Before the Passage of IIRIRA

The Government next argues that a Ninth Circuit decision that addressed "circumstances similar to petitioner's" and denied that alien's petition supports the result reached by the Second Circuit here. *See* Opp. 13-14 (citing *Valencia-Alvarez*, 469 F.3d at 1327-30). The opposite is true.

At issue in *Valencia-Alvarez* was whether an alien's seven-year clock, which started running in 1991, was subject to IIRIRA's stop-time rule. *Valencia-Alvarez*, 469 F.3d at 1321. The court ruled that, because seven years had not elapsed by the time IIRIRA was implemented in 1997, the petitioner had never been eligible for § 212(c) relief. *Id.* at 1330. The Ninth Circuit explicitly contrasted Valencia-Alvarez with other aliens—such as Mr. Zuluaga-Martinez—who had already completed seven years of continuous lawful presence in the United States *before* the passage of IIRIRA: "Thus, in *Generi*[4] and *Henry*,[5] the aliens *were eligible for*

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4 *Generi v. Ashcroft*, No. 4:03-cv-15, 2004 WL 771138 (W.D. Mich. April 13, 2004) (unpublished) (available at Pet. App. A-88).

discretionary relief when IIRIRA became effective, thus distinguishing them from Valencia-Alvarez who has never been eligible for discretionary relief." *Id.* at 1330 (emphasis added). Far from supporting the Second Circuit's decision here, the Ninth Circuit in *Valencia-Alvarez* acknowledged that aliens like Mr. Zuluaga-Martinez *were* eligible for § 212(c) relief because they possessed "an existing right before the retroactive application of § 1229b(d)(1) [§ 240A's stop-time rule] is implicated." *Id.*

c. The Second Circuit's Decision Depended Upon a Hypothetical, Counterfactual Analysis

The majority in the Second Circuit determined that "the relevant date of the determinative event [was] the commission of the drug offense on April 9, 1995," *see* Opp. 11, only because "*if* petitioner had been captured and successfully prosecuted ... and the INS had obtained a deportation order promptly after he committed the offense, he *could have* been deported without the possibility of relief because he *would not, at that time, have* accrued the seven years required by the repealed INA § 212(c)." *See Martinez v. I.N.S.*, 523 F.3d 365, 373-74 (2d Cir. 2008) (emphasis added). The Second Circuit thus explicitly grounded its decision in this hypothetical (and unlikely) chain of events, which all would have had to have occurred within one month—Mr. Zuluaga-Martinez purportedly was never eligible for § 212(c) relief because he *theoretically could have* been prosecuted, convicted, ordered deported, and deported prior to accruing seven years of continuous

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[5] *Henry v. Ashcroft*, 175 F. Supp. 2d 688 (S.D.N.Y. 2001).

residence. *See Martinez*, 523 F.3d at 378 (Straub, J., concurring) ("The majority hinges its decision on [an] unlikely hypothetical possibility"). This sort of counterfactual analysis is inconsistent with this Court's, or any court's, retroactivity decisions. *See* Pet. 19-20 & n. 3-4. But for the majority's use of this hypothetical counterfactual argument, the Second Circuit would have had no choice but to rule that retroactive application of the stop-time rule to Mr. Zuluaga-Martinez is impermissibly retroactive.

II. Reliance Is Not a Necessary Element of Retroactivity Analysis

This Court has repeatedly emphasized the fluidity of retroactivity analysis and that no one factor is dispositive. *See* Pet. 24. The Government acknowledges that "reasonable reliance" is only one of the many factors to be considered, *see* Opp. 15-16, yet, in trying to justify the retroactive application of the stop-time rule to Mr. Zuluaga-Martinez, it fails to discuss any other factor. *See* Opp. 16. When the other factors explicitly mentioned by this Court and acknowledged by the Government as essential to any retroactivity analysis—fair notice and settled expectations—are taken into account, it becomes clear that the only "commonsense, functional judgment" in this case is that the stop-time rule has attached "new legal consequences to events completed before its enactment." *St. Cyr*, 533 U.S. at 321. The notice given to Mr. Zuluaga-Martinez regarding the effect of the stop-time rule was unfair. He was not made aware of the effect of his April 1995 offense on continuous presence calculations until over a year later, and his settled expectations were disrupted because he would have continued to

have been entitled to discretionary relief under § 212(c) but for the retroactive application of IIRIRA's stop-time rule by the majority below.

a. The Second Circuit's Retroactivity Analysis Indeed Required Actual, Subjective Reliance

The Government adopts *ipse dixit* that the Second Circuit was not making reliance the *sine qua non* of retroactivity here. *See* Opp. 14-15 ("The court of appeals, however, specifically rejected that characterization of its holding .... That alone suffices to make further review of this question unwarranted in this case."). However, it is the substance of the decision rather than the majority's self-characterization of it that is subject to this Court's review. *See generally Kircher v. Putnam Funds Trust*, 547 U.S. 633, 649 (2006) (Scalia, J., concurring) ("appellate review is exactly what is involved in looking behind the face of an order to determine its *true* basis") (emphasis in original).

The majority below characterized its decision as based upon a lack of "changed consequences" rather than based upon a lack of actual reliance, but then proceeded to determine that no consequences for Mr. Zuluaga-Martinez had changed because he had not actually relied upon the repealed statute. *See* Pet. 25-27. This gambit did not fool Judge Straub, and should not fool this Court. The retroactive elimination of Mr. Zuluaga-Martinez's eligibility to apply for a waiver of deportation based on a crime committed before the new law was enacted constitutes a change in legal consequences under any reasonable understanding of that concept. *See* Pet. 26-27.

b. Whether Reliance Is a Necessary Element of Retroactivity Analysis Is an Important Federal Question with Constitutional Dimensions

The Government insists that Petitioner has failed to grasp "the importance of comparing cases involving the same statutory provisions," and that the acknowledged circuit split regarding the role of reliance in retroactivity analysis is irrelevant because some of those cases involved a different statute, or different parts of the same statute. *See* Opp. 16-17 & n.4. But *Landgraf* and *St. Cyr*'s holdings regarding the contours of the retroactivity inquiry are not grounded in the interpretation of any one particular statute, but rather are constitutionally rooted. The issues at stake here are matters of constitutional importance of the first order; as the Court explained in *Landgraf*, "the presumption against retroactive legislation is deeply rooted in our jurisprudence .... Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted." 511 U.S. at 265. If reliance is a *necessary* part of this Court's retroactivity analysis, then reliance must be present before *any* statute is determined to be impermissibly retroactive; if it is not a necessary element, then *no* statute can be rendered permissibly retroactive just because of a lack of reliance.

There is no dispute that the latter possibility is the correct one; the Government itself acknowledges that reliance is just one of many factors that courts take into account in making the

"commonsense, functional judgment" as to whether the statute is impermissibly retroactive. *See* Opp. 9, 15-16. Therefore, because Mr. Zuluaga-Martinez's had a settled expectation in May 1995 that he was eligible to apply for a waiver of deportation, it would violate elementary considerations of fairness to wind back the seven year clock to April 1995 and force Mr. Zuluaga-Martinez to be subject to a rule about which he could not possibly have known in 1995.

CONCLUSION

For the reasons set forth herein, Petitioner respectfully requests that this Court grant the writ of *certiorari* and review this case.

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